

**INTERNATIONAL ANTI-MONEY LAUNDERING STANDARDS AND  
THEIR IMPLEMENTATION BY VIETNAM**

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## **ABSTRACT**

In recent decades, the international community has made a concerted effort to develop the international Anti-Money Laundering Standards (AMLSs) and enhance their implementation at a national level. It is submitted that the AMLSs serve various laudable aims and States should adequately implement those standards. In fact, most States, including Vietnam, have been striving for the highest level of compliance with the AMLSs. This thesis suggests that external pressure and State socialization has compelled developing States to implement and comply with the international AMLSs, and Vietnam is an obvious case study.

This thesis examines concisely the development and underlying rationales of a number of key categories of international AMLSs, and the difference in national implementation of each category. The implementation of such multifaceted standards in a transitional State, like Vietnam, requires substantial legal and administrative reform, which often faces numerous domestic hurdles. The examination of Vietnamese AML legislation has revealed that while significant deficiencies remain, certain categories of AMLSs have been transformed wholesale into Vietnamese law. As a part of the objectives of this study, suggestions for law reform have been made to close the gaps between the AML laws of Vietnam and the international standards. It is likely that Vietnam, within a short time, will revise the laws in order to obtain a better degree of compliance. However, given the political, economic and legal factors of Vietnam, this thesis argues that the enforcement of the laws in practice will be still limited. In other words, in the near future Vietnam can achieve what appears to be a high level of compliance with the international AMLSs, but only on paper.



## **ABBREVIATIONS**

AFP	Australian Federal Police
AML	Anti-Money Laundering
AMLD	Anti-Money Laundering Department
AMLSs	Anti-Money Laundering Standards
AMMTC	ASEAN Ministerial Meeting on Transnational Crime
APG	Asia/Pacific Group on Money Laundering
ARS	Alternative Remittance System
ASEAN	Association of Southeast Asian Nations
ASEANPOL	Association of National Police Forces of the ASEAN
ATM	Automatic Teller Machine
BSA	Bank Secrecy Act
CDD	Customer Due Diligence
CFT	Countering Financing of Terrorism
CPC	Criminal Procedure Code
CPV	Communist Party of Vietnam
DEA	US Drug Enforcement Administration
DNFBPs	Designated-Non Financial Business and Professions
E-ADS	Electronic ASEANAPOL Database System
EU	European Union
FATF	Financial Action Task Force
FBI	US Federal Bureau of Investigation
FDI	Foreign Direct Investment
FIU	Financial Intelligence Unit
FSRB	FATF-style Regional Body
GDP	Gross Domestic Product
GTA	Global Money Laundering and Terrorist Financing Threat Assessment
ICRG	International Co-operation Review Group
IMF	International Monetary Fund
INR	Interpretive Note to Recommendation
INSCR	International Narcotic Control Strategy Report
INTERPOL	International Criminal Police Organization
JSCB	Joint Stock Commercial Bank

JTCC	Vietnam-Australia Joint Transnational Crime Centre
JVB	Joint Venture Bank
KYC	Know Your Customer
LCC	Low Capacity Country
ML	Money Laundering
MLA	Mutual Legal Assistance
MLCA	Money Laundering Control Act of 1986 (the United States)
MOU	Memoranda of Understanding
MPS	Ministry of Public Security
NCCT	Non-Cooperative Countries or Territories
OECD	Organization for Economic Coordination and Development
OTC	Over-the-Counter
PEP	Personally Exposed Person
POCA	Proceeds of Crimes Act
PSML	Prevention and Suppression of Money Laundering
R	Recommendation
RBA	Risk-based Approach
RICO	Corrupt Organizations Act
SBV	State Bank of Vietnam
SCC	State Securities Commission
SOCB	State-Owned Commercial Bank
SPP	Supreme People's Procuracy
STR	Suspicious Transaction Report
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
US	United States
VBF	Vietnam Bar Federation
VND	Vietnam Dong (the Vietnamese currency)
WB	World Bank
WTO	World Trade Organization

## LIST OF PUBLICATIONS

1. Chat Le Nguyen, “The International Anti-Money Laundering Regime and Its Adoption by Vietnam” (2014) 4(1) Asian Journal of International Law 197.
2. Chat Le Nguyen, “The Growing Threat of Money Laundering to Vietnam: The Necessary of Intensive Countermeasures” (2013) 16(4) Journal of Money Laundering Control 321.
3. Chat Le Nguyen, “Criminalization of Money Laundering in the International Anti-Money Laundering Regime and its Adoption by Vietnam” (2013) 14(1) Australian Journal of Asian Law 1.
4. Chat Le Nguyen, “Towards the Effective ASEAN Mutual Legal Assistance in Combating Money Laundering” (2012) 15 (4) Journal of Money Laundering Control 383 (*2013 Highly Commended Paper awarded by Emerald Group Publishing*).

## **Chapter 1**

### **INTRODUCTION**

- 1.1 Background and the Research Questions**
  - 1.2 The Aims of the Thesis**
  - 1.3 Literature Review and Contributions of the Thesis**
  - 1.4 Scope of the Thesis**
  - 1.5 Structure of the Thesis**
  - 1.6 Research Approaches and Methodologies**
- 

#### **1.1 Background and the Research Questions**

Although coined relatively recently, since the 1980s “money laundering” and “anti-money laundering” (AML) have become well-known legal terms and subjects of legal study globally. Money laundering across national borders has emerged as a transnational crime, which challenges each State and the international community. The United States (US), a number of other developed countries (mainly those of Europe) and several international institutions have taken vigorous action against money laundering. They have also sponsored and developed a range of international anti-money laundering standards (AMLSs). The AMLSs involve not only many areas of criminal law (e.g., the criminalization of money laundering or mutual legal assistance in AML) but also other branches of law (e.g., banking laws). These standards are embodied in international conventions and recommendations (or guidelines) formulated by different international institutions.<sup>1</sup> The primary conventions and recommendations are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention),<sup>2</sup> the United Nations Convention against Transnational Organized Crime (Palermo Convention),<sup>3</sup> the United Nations

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<sup>1</sup> See UNODC (2013), “An Overview of the UN Conventions and other International Standards Concerning Anti-Money Laundering and Countering the Financing of terrorism”, available at: [http://www.imolin.org/pdf/imolin/Overview%20Update\\_0107.pdf](http://www.imolin.org/pdf/imolin/Overview%20Update_0107.pdf) (accessed 11 March 2014).

<sup>2</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990.

<sup>3</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003.

Convention against Corruption (UNCAC)<sup>4</sup> and the Financial Action Task Force (FATF) Recommendations.<sup>5</sup> Two questions arise:

- i) *How have the international AMLSs been developed?*
- ii) *What are the international AMLSs?*

It is noteworthy that the international AMLSs have been diffused surprisingly rapidly. After only two decades, more than 180 jurisdictions with different backgrounds have joined the FATF or a FATF-style regional body and committed to implementing a similar set of AMLSs.<sup>6</sup> However, many of them, especially developing countries, have been pressured to implement the international AMLSs, rather than to simply choose voluntarily whether to implement them or not.<sup>7</sup> In addition, in a number of developing countries, research about money laundering and AML has just become a concern and is still in its infancy. This is particularly so in Vietnam, the country upon which this thesis focuses. The following questions arise:

- iii) *How have the international AMLSs been diffused?*
- iv) *How have the international AMLSs been implemented in different jurisdictions?*

In recent years, Vietnam has responded to the call for international cooperation in fighting transnational crime, including money laundering, by joining the most crucial international conventions on the suppression of transnational crime, known as the suppression conventions. Vietnam has ratified the 1988 Vienna Convention, the UNCAC, and the Palermo Convention.<sup>8</sup> Vietnam is an official member of the Asia/Pacific Group on Money Laundering (APG) and has committed itself to the FATF Recommendations. As a result, Vietnam has gradually implemented the international AMLSs and strengthened its AML legal framework. Nevertheless, substantial inadequacies in Vietnam's AML legal framework

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<sup>4</sup> *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005.

<sup>5</sup> FATF (2012), "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations", available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 22 May 2014).

<sup>6</sup> FATF, "An introduction to the FATF and its work" at 1, available at: <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/Introduction%20to%20the%20FATF.pdf> (accessed 20 November 2013).

<sup>7</sup> J.C. Sharman, "Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States" (2008) 52(3) *International Studies Quarterly* 635 at 635.

<sup>8</sup> Vietnam ratified these treaties in 1997, 2009, and 2012 respectively.

compared to the international standards still exist.<sup>9</sup> In 2011, June 2012 and then June 2013, the FATF “blacklisted” Vietnam as one of the jurisdictions with strategic AML/CFT (Countering Financing of Terrorism) deficiencies in its public statements.<sup>10</sup> Recently, in February 2014, Vietnam was removed from the FATF’s “blacklist”.<sup>11</sup> This prompts the further questions:

- v) *Why and how has Vietnam implemented the international AMLSs?*
- vi) *What are the challenges to the implementation of international AMLSs in Vietnam?* and
- vii) *What are the significant shortfalls in Vietnam’s existing AML legal framework?*

It is clear that the international community has intensified the pressure on Vietnam to formulate a comprehensive AML legal framework adhering to the international requirements. Compliance with the international AMLSs is important for Vietnam on the way of international integration, especially for access to the global financial market.<sup>12</sup> Nevertheless, the implementation of AMLSs will unavoidably result in the revision and development of relevant domestic laws of Vietnam.<sup>13</sup> As the changes of the laws must be compatible with Vietnam’s political, legal and economic basis, over which Vietnam has its own sovereignty, the law reform process under international obligations is always controversial and challenging. In recent years, academics, practitioners and international organizations have paid a great deal of attention to the final question:

- viii) *How can Vietnam reform its AML legal framework to obtain a greater level of compliance with the international standards?*

It is also the central research question of this thesis entitled: ***“International Anti-Money Laundering Standards and their Implementation by Vietnam”***.

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<sup>9</sup> Until 2009, a comprehensive report on the inadequacies was APG (2009), “VIETNAM ME1 (Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism)”, available at: <http://www.apgml.org/documents/docs/17/Vietnam%20ME1.pdf> (accessed 20 April 2013).

<sup>10</sup> See FATF (2011), “High-Risk and Non-Cooperative Jurisdictions: FATF Public Statement - 24 June 2011”, available at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/fatfpublicstatement-24june2011.html> (accessed 1 January 2014); FATF (2012), “High-risk and Non-Cooperative Jurisdictions”, available at: [www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/](http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/) (accessed 2 January 2014); and FATF (2013), “High-Risk and Non-Cooperative Jurisdictions”, available at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2013.html> (accessed 2 January 2014).

<sup>11</sup> See FATF (2014), “High-Risk and Non-Cooperative Jurisdictions: FATF Public Statement - 14 February 2014”, available at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-feb-2014.html> (accessed 16 May 2014).

<sup>12</sup> Chapter 3 will discuss why the compliance is important for Vietnam.

<sup>13</sup> The status of international law in Vietnamese legislation is explained and commented in chapter 3.

## 1.2 The Aims of the Thesis

Although this thesis answers all the questions raised above, the focus is on finding a comprehensive response to the final and central question. In general, the thesis aims to:

- a) Provide a reasonably comprehensive examination of the international AMLSs, set out in some detail the main legal obligations that the international community imposes on States and highlight the main underlying mechanisms used to diffuse the international AMLSs.
- b) Analyse the experience of Vietnam in implementing the AMLSs and offer the most feasible suggestions for law reforms to further compliance with the international AMLSs. This includes an examination of how Vietnam has implemented the AMLSs; a textual analysis of weaknesses and inadequacies in the existing AML legal framework; and an examination of the Vietnamese political, legal and economic background that challenges the implementation.

Through the examinations, the thesis suggests that Vietnam has not much choice but to implement and comply with the AMLSs, and thus engage in law and administrative reforms. But the thesis suggests that in doing so Vietnam faces considerable hurdles: i) the reluctance of the Vietnamese Communist Party and government to enforce AML measures in practice (mostly because of rampant corruption); ii) the incompatible nature of many aspects of the Vietnamese legal system (e.g., with some peculiar or undeveloped concepts and procedures in Vietnamese criminal law) with a number of international AMLSs; and iii) the limited capacity of Vietnam for AML (e.g., the incompetence of Vietnamese agencies in AML and the poor infrastructure of the Vietnamese financial system). Therefore, this thesis argues that Vietnam can obtain a strong “paper” implementation of international AMLSs (through legal and institutional reforms), but an actual implementation will be feeble. This scenario indicates that, in countries like Vietnam, three prerequisite elements for the successful implementation of AMLSs are a genuine political will, a proper legal appropriateness and the sufficient resources devoted to AML. Without one of them, the implementation of AMLSs in fact is likely to be unbalanced and ineffective.

### 1.3 Literature Review and Contributions of the Thesis

The proliferation of international AML standards, their institutionalization and their diffusion have become increasingly attractive subjects in the scholarship of law at both the national and international level. This thesis makes reference to other works that have already been undertaken in the field. It, however, goes beyond the existing studies and fills in the gaps in their analyses to some extent. This section summarizes the significant studies of the legal aspects of international AMLs, the diffusion and implementation of AMLs, and Vietnam's AML legislation. The contribution of this thesis and how it closes the gaps of those studies is also explained.

#### 1.3.1 *Studies of the International AMLs*

It can be seen that the international AMLs are multifaceted, and they can be categorized as consisting of six groups of standards for: i) the criminalization of money laundering; ii) jurisdiction over transnational money laundering; iii) provisional measures and confiscation of criminal assets; iv) mutual legal assistance in international AML; v) extradition for money laundering offences; and vi) prevention of the use of financial institutions, designated non-financial businesses and professions for the purpose of money laundering.<sup>14</sup> Several academics, practitioners and international organizations have already carried out research on some categories or on the international AMLs as a whole.

One of the early and most comprehensive analyses of the international AMLs, especially regarding international cooperation in AML was conducted by Stessens.<sup>15</sup> His book provides an extensive comparative examination of the AMLs and their implementation in a number of selected States. He suggests that the AML regime is a new international law enforcement model. This research, however, was undertaken before the adoption of the Palermo Convention and the UNCAC, which are the two crucial international AML-related treaties. In addition, Stessens is silent on some issues, such as extradition for money laundering offences or the risk-based approach in AML.<sup>16</sup>

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<sup>14</sup> See UNODC, above n1.

<sup>15</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000).

<sup>16</sup> The risk-based approach is provided for in Recommendation 1 of the 2012 FATF Recommendations (see FATF, above n5). This approach is clarified in Chapter 9.



Gilmore details the development and substance of the international AMLSs, but focuses very specifically and in great detail on the European region.<sup>17</sup> Moreover, his book lacks specific discussion about the implementation of international AMLSs.

Boister<sup>18</sup> deals with the AMLSs as part of transnational criminal law. Most criminal law aspects of the international AMLSs are discussed comprehensively. Although there is only one chapter about the criminalization of money laundering, other international AMLSs, such as retrieving criminal assets or mutual legal assistance in AML, are also examined. Nonetheless, an examination of the financial regulations related to AML is not provided by this book.

More recently, Durrieu has updated the discussion of international effort to develop the international AMLSs through “hard law” and “soft law” as well as through the institutional framework of AML.<sup>19</sup> He extensively examines the criminalization of money laundering, the nexus between the crime of money laundering and its predicate offences, and jurisdiction over transnational money laundering, provided for by both international law and a range of national laws. He reveals the major discrepancies, gaps and ambiguities among national laws as well as in international law on these issues. His research project, nevertheless, misses the discussion of other crucial AMLSs, such as confiscation of criminal assets, international cooperation in AML and financial regulations on AML.

Although using the above-mentioned research projects as critical reference points, all of these works have shortcomings. This thesis pulls many of the aspects they deal with together and, to some extent, goes beyond their coverage.

### ***1.3.2 Research on Theory of the Diffusion and Implementation of International AMLSs***

It is noticeable that only a few scholars have researched on how the international AMLSs have been diffused; why countries, particularly developing countries, have implemented and complied with the international AMLSs; and what factors significantly impact on the implementation of AMLSs in these countries.

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<sup>17</sup> William C. Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4<sup>th</sup> ed, Council of Europe, 2011).

<sup>18</sup> Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012).

<sup>19</sup> Roberto Durrieu, *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (Martinus Nijhoff, 2013).

Reuter and Truman<sup>20</sup> analyse the evolution of the international AML regime, its components and national implementation of the regime, with the reference to developing countries, but only very briefly.

Basing her work purely on a doctrinal analysis and treaty interpretation, Ping examines different aspects of the global and European legal framework on AML.<sup>21</sup> She also describes and comments on the development of the Chinese AML policy and legal framework. Chinese AML-related laws are briefly evaluated and compared with the relevant international provisions. What she does not discuss is why and how a State, like China, has implemented the AMLSs. She also omits the discussion of the factors that impact on the implementation of AMLSs. In a similar vein, Orlova outlines a comparative analysis of the Russian AML legal framework, but does not discuss comprehensively the rationale behind the development of Russia's AML legislation and the reasons for existing inadequacies.<sup>22</sup>

Sharman carries out one of the leading research projects on the diffusion of international AMLSs.<sup>23</sup> He points out that "blacklisting", socialization and competition are the main mechanisms for the diffusion of AML policy; and that developing countries implement the global AMLSs due to fear of reputational damages and economic losses that result from the noncompliance with international AMLSs. However, he concentrates entirely on the role of the FATF, the FATF-style regional bodies and the relevant international financial institutions (the International Monetary Fund (IMF) and the World Bank (WB)) in the diffusion of AMLSs. He does not refer to the treaty obligations to implement AMLSs. Employing a similar approach, Heilmann and Schulte-Kulkmann engage in a case study of Chinese AML policy.<sup>24</sup> Nevertheless, among various domestic factors that affect the implementation of international AMLS in China, these authors only consider the political factors and neglect the legal factors.

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<sup>20</sup> Peter Reuter and Edwin M. Truman, *Chasing Dirty Money: The Fight against Money Laundering* (Peterson Institute, 2004).

<sup>21</sup> Ping He, *Money Laundering: Suppression and Prevention - The Research on the Legislation Concerning Money Laundering* (VDM Publishing, 2008).

<sup>22</sup> Alexandra V. Orlova, "Russia's Anti-Money Laundering Regime: Law Enforcement Tool or Instrument of Domestic Control?" (2008) 11(3) *Journal of Money Laundering Control* 210.

<sup>23</sup> J.C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011).

<sup>24</sup> Sebastian Heilmann and Nicole Schulte-Kulkmann, "The Limits of Policy Diffusion: Introducing International Norms of Anti-Money Laundering into China's Legal System" (2011) 24(4) *Governance: An International Journal of Policy, Administration, and Institution* 639 at 13.

Machado discusses how Brazil and Argentina have responded to the “transnational AML order” (AMLO).<sup>25</sup> The author is mainly concerned with the interaction between “hard law” and “soft law”, and between public and private actors in the AMLO. The author provides a descriptive analysis of how Brazil and Argentina, under the FATF’s pressure, have changed their laws related to the money laundering offence. However, the description is very brief and provides little explanation of what the ultimate impact is likely to be, and how and why this is so.

This thesis establishes its own theory of AMLSs diffusion, then applies the theory to the discussion of Vietnam’s context as a case study. In addition, the main factors that influence the implementation of AMLSs in Vietnam are identified and scrutinized extensively; of which the legal factors are emphasized.

### ***1.3.3 Research on Money Laundering Situation, AML and the Implementation of International AMLSs in Vietnam***

There are a few research projects on money laundering, AML and the implementation of international AMLSs in Vietnam, and all of them have significant limitations.

Although focusing on the discussion about the implementation of UN drug control conventions by Vietnam, Hoa’s doctoral thesis is one of the early projects which offer some insights into Vietnamese laws related to the AMLSs and suggest remedies for these inadequacies.<sup>26</sup> This research project, of course, cannot address all of the research questions raised above.

In 2009, the APG released a report on mutual evaluation of the Vietnam’s AML legal framework.<sup>27</sup> This report had been the most comprehensive examination of the Vietnamese AML legislation up to 2009. The report revealed numerous inadequacies in the Vietnam’s AML legal framework. In addition, from 2007 – 2011, the United Nations Office on Drugs and Crime (UNODC Vietnam Country Office) in cooperation with some Vietnamese counterpart agencies carried out the project “VNMS65 - Strengthening of the Legal and Law Enforcement Institutions in Preventing and Combating Money Laundering in Vietnam”. This

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<sup>25</sup> Ma’ira Rocha Machado, “Similar in Their Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina” in Gregory Shaffer (ed) *Transnational Legal Ordering and State Change* (Cambridge University Press, 2012) at 15.

<sup>26</sup> Hoa Phuong Thi Nguyen, “Legislative Implementation by Vietnam of its Obligations under the United Nations Drug Control Conventions” (Doctoral Thesis, University of Wollongong, 2008).

<sup>27</sup> APG, above n9.

project conducted research on typologies of money laundering in Viet Nam and on the vulnerability of a cash-based economy to money laundering.<sup>28</sup> It also provided a legal assessment report on the existing Vietnamese AML/CFT legislation against the international standards.<sup>29</sup> The recommendations in the reports have helped to revise the relevant articles in the Penal Code of Vietnam. The reports of the APG and of UNODC were, however, a purely descriptive comparison between the Vietnamese AML-related laws and the corresponding international standards. Furthermore, the Vietnamese AML legislation has developed significantly since 2009 as a result of the ratification of the Palermo Convention and the enactment of further specific AML-related laws, especially the Law on Prevention and Suppression of Money Laundering adopted in 2012.<sup>30</sup>

This thesis is currently the only comprehensive and updated study of money laundering situation and the implementation of international AMLs in Vietnam.

#### **1.4 Scope of the Thesis**

This thesis is confined to examination of the six key above-mentioned categories of AMLs incorporated in the FATF Recommendations, the 1988 Vienna Convention, the Palermo Convention, the UNCAC, the European Conventions and Directives on AML/CFT, the guidelines on AML/CFT of the Basel Committee on Banking Supervision, the Wolfsberg AML Principles and Egmont Principles for Information Exchange and Operational Guidance for FIUs.<sup>31</sup> The thesis, of course, cannot discuss extensively every aspect of six groups of the international AMLs. Rather it focuses on the main issues/problems in each and in their articulation with the Vietnamese AML legal framework.

Selected jurisdictions are used for comparison in the implementation of AMLs. They are the US, the United Kingdom (UK), France, Germany and Russia. The choice of these States and specifically their legal provisions for the comparison is based on the principles of comparative law research and the practice of using comparative law in law reform (which is rationalized below in section 1.6).

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<sup>28</sup> UNODC, *"Final Evaluation Report: Project Number VNM/S65"* at 10, available at: [http://www.unodc.org/documents/evaluation/ProjEvals-2012/VNMS65\\_FE\\_Report\\_FINAL\\_rev.pdf](http://www.unodc.org/documents/evaluation/ProjEvals-2012/VNMS65_FE_Report_FINAL_rev.pdf) (accessed 27 May 2013).

<sup>29</sup> Ibid, at 8.

<sup>30</sup> Luat Phong, Chong Rua Tien [*Law on Prevention and Suppression of Money Laundering*] (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013.

<sup>31</sup> See UNODC, above n1. The recommendations and guidelines are updated regularly.

When it comes to the suggestions for law reforms in Vietnam, this thesis is not going to make detailed extensively reasoned proposals and a fully worked out programme. The thesis only attempts to offer tentative proposals for law reforms.

## **1.5 Structure of the Thesis**

This thesis consists of ten chapters, including an Introduction (*chapter 1*) and Conclusion (*chapter 10*).

The examination begins in *chapter 2* with the contours of money laundering in general and an overview of the money laundering situation within the Vietnamese context. The chapter examines the concept of money laundering, the money laundering mechanisms and typologies, the trends, and the harms of money laundering. The money laundering situation in Vietnam, including the scale and typologies, is assessed based on the analysis of selected predicate crimes and facilitators of money laundering.

*Chapter 3* first outlines the evolution of international AMLSs. Then it addresses the following questions: i) How have the international AMLSs been diffused? ii) Why and how do States implement the international AMLSs, in particular why and how has Vietnam implemented the AMLSs? Attention is also paid to the political and legal factors of Vietnam that shape its AML legislation.

The thesis, then, scrutinizes each category of the international AMLSs and its implementation in Vietnam. The first one, criminalization of money laundering, is examined in *chapter 4*. This chapter sketches international standards in regard to the criminalization of money laundering (e.g., the justifications for internationalization of the criminalization of money laundering and the main constituent elements of money laundering offences) provided for in the suppression conventions and the FATF Recommendations. Disparities among the criminalization of money laundering by some States are also explored. The next part of this chapter considers how Vietnam has criminalized money laundering; what inadequacies exist; and how political factors (e.g., the willingness of law enforcement agencies) and legal factors (e.g., the criminal law principles) impacts on the criminalization. Relying on the analysis and comparison, the chapter suggests what Vietnam should do to remedy its criminalization of money laundering.

*Chapter 5* looks at one of the fundamental issues - jurisdiction over transnational money laundering. After equipping itself with the concepts of transnational money laundering and criminal jurisdiction under international law, the chapter charts the general conditions and

principles for the establishment of jurisdiction over the transnational money laundering offence. The variations in exercising extraterritorial jurisdiction over money laundering offences by different States are also explored. Moving to the Vietnamese context, this chapter examines how the existing principles of criminal jurisdiction can be applied to money laundering crimes (legal appropriateness) and whether relevant authorities are willing to exercise the jurisdiction (political will). Then, a number of suggestions are made to strengthen the relevant laws of Vietnam.

**Chapter 6** continues with the examination of the third category of international AMLSs – provisional measures and confiscation of criminal assets. Firstly, the concepts of “provisional measures”, “confiscation” and “forfeiture” are clarified with reference to its historical development in English law and in US law. The chapter then discusses the types and procedures of confiscation, including confiscation of the assets involved in money laundering, provided for in the international legal instruments and in the laws of some States. Forfeiture in the US and conviction-based confiscation in the UK is detailed. Finally, the confiscation legislation of Vietnam is criticized (whether the concept and procedures of confiscation of criminal proceeds in Vietnam are compatible with the international standards) and the suggestions for law reforms are offered.

Mutual legal assistance (MLA) in AML is scrutinized in **chapter 7**. The first part of the chapter describes the interstate exchange of AML information, which is mainly conducted directly through national competent law enforcement agencies (e.g., the police force) or Financial Intelligence Units (FIUs). The second part examines treaty-based MLA in AML, including legal assistance for the purposes of confiscation of criminal assets, sharing of confiscated assets and returning assets. The legal basis and conditions/principles of treaty-based MLA is fleshed out. Last but not least, the chapter examines the relevant laws of Vietnam regulating MLA in criminal matters in general and in AML in particular. Furthermore, suggestions are given to enhance Vietnam’s MLA laws and practice.

**Chapter 8** focuses on extradition for money laundering offences. This chapter first charts extradition in general, including the legal basis, conditions, exceptions and procedure, with the particular attention being paid to extradition for transnational crime. This is followed by the discussion on some issues related to extradition for money laundering offences. Finally, this chapter investigates the general Vietnamese legislation on extradition and how it can be applied to money laundering crimes. The most necessary and feasible suggestions for law reforms of Vietnam are then set out.

Moving beyond the subjects of criminal law, *chapter 9* sets out the obligations imposed on financial institutions, designated non-financial businesses and professions to prevent the criminal use of these entities for money laundering purposes. The primary obligations, viz. customer due diligence, record keeping and reporting obligation are analysed. The interaction between these preventive measures and financial privacy and the right to professional secrecy is also discussed. In addition, the issues of risk-based approach and financial inclusion are illustrated. How these standards have been implemented by Vietnam is then examined. The chapter examines whether the preventive measures are appropriate for the Vietnamese financial infrastructure, and whether Vietnamese entities are willing to adopt those measures.

Finally, *chapter 10*, the Conclusion, draws the separate conclusions of eight chapters together and draws some conclusions about the implementation of AMLSs by Vietnam as a whole.

## **1.6 Research Approaches and Methodologies**

### ***1.6.1 Approach to Assessing Compliance with the International AMLSs***

It is important to note that the majority of international AMLSs are incorporated in the 1988 Vienna Convention, the Palermo Convention and the UNCAC; so, for the most part, the approach to assessing the implementation of those conventions is applied to assessing the implementation of AMLSs. In general, States implement international treaties into domestic law based upon the doctrine of “incorporation” or “transformation”.<sup>32</sup> According to the doctrine of “incorporation”, a treaty ratified by the State will become part of the municipal law automatically without being expressly adopted by the legislature or the courts of that State.<sup>33</sup> While the doctrine of “transformation” postulates that any provision of international treaties do not come into effect in a State until it has been specifically enacted into domestic law, for example, by the passage of a law.<sup>34</sup> Although Vietnam does not explicitly adopt either the “incorporation” or the “transformation” doctrine;<sup>35</sup> in general practice,

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<sup>32</sup> See Malcolm N. Shaw, *International Law* (6<sup>th</sup> ed, Cambridge University Press, 2008) at 139-141.

<sup>33</sup> Ibid, at 140.

<sup>34</sup> Ibid, at 139.

<sup>35</sup> See article 6 of Luật Ban hành văn bản quy phạm pháp luật [*Law on the Promulgation of Legal Documents*] (Vietnam) Law No. 17/2008/QH12, 30 June 2008, entered into force 1 January 2009. Details of this article and further discussion are provided in chapter 3.

“transformation” appears to be used.<sup>36</sup> The implementation of international treaties in Vietnam often results in an amendment, supplement, annulment and enactment of relevant domestic laws.<sup>37</sup> For example, at present, one of the crucial tasks in the process of implementing the Palermo Convention in Vietnam is to revise and supplement the Penal Code, the Criminal Procedure Code and the Law on Mutual Legal Assistance in compliance with the convention.<sup>38</sup>

It is worth noting that although there are numerous published research projects on how to assess compliance of States with international law,<sup>39</sup> this thesis agrees that “the general level of compliance with international agreements cannot be empirically verified”.<sup>40</sup> In addition, it accepts that “questions of compliance are often contestable and complex, subtle, and frequently subjective evaluation”.<sup>41</sup> Jacobson and Weiss suggests that compliance with an international agreement refers to whether countries in fact adhere to the provisions of the agreement and to the implementing measures that they have instituted.<sup>42</sup> The FATF assesses compliance based on the extent to which national laws and other enforceable means are compliant with the FATF Recommendations and whether the institutional AML framework is in place.<sup>43</sup> This thesis uses this approach to evaluate Vietnam’s AML system, because the FATF plays a major role in setting up the international AMLs and compliance with the FATF’s criteria is important to Vietnam.

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<sup>36</sup> Hoang Phuoc Hiep, et al., “Noi Luat Hoa Cac Dieu Uoc Quoc Te Viet Nam Ky Ket va Tham Gia Phuc Vu Qua Trinh Hoi Nhap Kinh Te Quoc Te” [*Hoang Phuoc Hiep and others, Implementing International Agreements in Vietnam to Intergrate into the Global Economy*] (Vien Nghien Cuu Khoa Hoc Phap Ly [*Institute of Legal Science*]), 2007, part II.

<sup>37</sup> See *ibid.*

<sup>38</sup> See Thu Tuong Chinh Phu, “KE HOACH Trien Khai Thuc Hien Cong Uoc Chong toi Pham Co To Chuc Xuyen Quoc Gia va Nghi Dinh Thu ve Phong Ngua, Trung Tri, Tran Ap Toi Buon Ban Nguoi, Dac Biet La Phu Nu va Tre Em” [*The Prime Minister, Plan on Implementing the Convention on Suppression of Transnational Organized Crimes and Protocols on Prevention & Suppression of Trafficking in Persons, especially Trafficking of Women and Children*], 18 April 2013, para. II(a). Vietnam ratified the Palermo Convention in June 2012.

<sup>39</sup> For example, Abram Chayes and Antonia Handler Chayes, “On Compliance” (1993) 47(2) *International Organization* 175; and Peter M. Haas, “Choosing to Comply: Theorizing from International Relations and Comparative Politics” in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000).

<sup>40</sup> Chayes and Chayes, *ibid.*, at 176.

<sup>41</sup> *Ibid.*, at 198.

<sup>42</sup> Harold K Jacobson and Edith Brown Weiss, “Strengthening Compliance with International Environmental Accords: Preliminary Observations from Collaborative Project” (1995) 1 *Global Governance* 119 at 123.

<sup>43</sup> See FATF, “*Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*” (February 2013) at 12, available at: <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (accessed 29 May 2013).



It should be noted that effectiveness is the question whether the goals of the standards are achieved and may be independent from compliance.<sup>44</sup> The FATF defines effectiveness as “the extent to which the defined outcomes are achieved”.<sup>45</sup> The FATF also indicates that “the goal of an assessment of effectiveness is to provide an appreciation of the whole of the country’s AML/CFT system and how well it works. Assessing effectiveness is based on a fundamentally different approach to assessing compliance with the Recommendations”.<sup>46</sup> It means that the goal of compliance assessment of AMLSs implementation is distinguished from the goal of effectiveness assessment. Thus, this thesis, subject to its aims, excludes the examination of effectiveness of the international AMLSs as well as of the Vietnamese AML legal framework.

### **1.6.2 Approach to Suggestions for Legal Reforms in Vietnam**

Suggestions for law reform in this project are dependent on comparative law and the theory of “legal transplants”. Many scholars have studied the use of comparative law as a tool of legal reforms,<sup>47</sup> and examined the process of legal transplantation/borrowing by which international and foreign legal norms are adopted into a particular domestic legal system.<sup>48</sup> There has been much debate on the possibility of “legal transplants” and the elements that impact on outcomes of the legal transplantation process.<sup>49</sup> Although it is even argued that “legal transplants practically never work”<sup>50</sup> or “legal transplants” are impossible,<sup>51</sup> this

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<sup>44</sup> Dinah Shelton, “Introduction: Law, Non-Law and the Problem of ‘Soft Law’” in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000).

<sup>45</sup> FATF, above n43, at 14.

<sup>46</sup> Ibid.

<sup>47</sup> Kahn-Freund is one of the first scholars concerned with comparative law as a tool of law reform (see Otto Kahn-Freund, “On Uses and Misuses of Comparative Law” (1974) 37(1) *The Modern Law Review* 1). For an analysis of comparative law, particularly in Asia including Vietnam, see Penelope (Pip) Nicholson and Sarah Biddulph (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhof, 2008).

<sup>48</sup> Kahn-Freund clarifies the meaning of “transplant” by taking the example of transferring human organs (see Kahn-Freund, above n47, at 5-6). Gillespie offers a critical analysis of theories of legal transplantation and the application to commercial law reform of Vietnam (see John Gillespie, *Transplanting Commercial Law Reform: Developing a ‘rule of Law’ in Vietnam* (Ashgate Publishing Company, 2006)). Nicholson provides insights into the development of Vietnam’s court systems through the process of legal transplant/borrowing, (see Penelope (Pip) Nicholson, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Martinus Nijhoff, 2008)).

<sup>49</sup> An extensive literature review of research on “legal transplants” is provided by Cuong Nguyen, “The Drafting of Vietnam’s Consumer Protection Law: An Analysis from Legal Transplantation Theories” (Doctoral Thesis, University of Victoria (Canada), 2011) at 24-58.

<sup>50</sup> Robert B. Seidman, *The State, Law, and Development* (St. Martin's Press, 1978) at 34.

thesis accepts that that “borrowing from another legal system is the most common form of legal change”<sup>52</sup> and “legislative drafters borrow institutions, policy or legal solutions and legislative texts from foreign jurisdictions (national, EU and international) as a means of promoting and developing legislation quickly and effectively”.<sup>53</sup> That is the case, at least in Vietnam - a State which has a long history of legal borrowing, notably from China, France, the former Soviet Union, and recently from some Western countries.<sup>54</sup> It is worthy of note that transplanting may result in the import of a whole body of law or parts of laws to a country.<sup>55</sup> Legal borrowing can be made from States with different legal and political traditions, even from one at a much higher level of development.<sup>56</sup> Following this view, the thesis suggests Vietnam should consider and borrow different parts, if any, of AML laws from a number of States with divergent backgrounds. However, States and legal sources for the comparison and borrowing should be, of course, appropriately selected and subject to certain principles.

The legal comparison in this thesis is based upon the principle of “functionality”, which determines the choice of law to compare and the scope of the undertaking.<sup>57</sup> In each chapter, suggestions for reform of Vietnam’s laws are given after comparing with the related international AMLSs and with the appropriate versions of implementation in the chosen foreign jurisdictions. Driven by the “functionality” principle, the chosen foreign States are the US, the UK, Russia, France and Germany. The US and the UK have profound influence on the development of international AMLSs. Germany and France have advanced national AML legal frameworks and provide good examples of how compliance with the FATF can be achieved.<sup>58</sup> In addition, France, Germany and especially Russia share common legal

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<sup>51</sup> Pierre Legrand, “What “Legal Transplants”?” in David Nelken and Johannes Feest (eds) *Adapting Legal Cultures* (Hart Publishing, 2001) at 57.

<sup>52</sup> See, e.g., Alan Watson, *Legal Origins and Legal Change* (Hambleden Press, 1991) at 73; and Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974) at 16-20.

<sup>53</sup> Helen Xanthaki, “Legal Transplants in Legal Legislation: Defusing the Trap” (2008) 57 *International and Comparative Law Quarterly* 659 at 659.

<sup>54</sup> A brief history of legal transplantation into Vietnam is provided in Gillespie, above n48, at 40-67. He highlights some case studies of how Vietnam borrowed law from these countries when drafting new laws (other than criminal laws).

<sup>55</sup> Nicholson, above n48, at 22-23.

<sup>56</sup> This view is supported by e.g., Alan Watson, “Legal Transplants and Law reform” (1976) 92(JAN) *Law Quarterly Review* 79 at 79; and Nicholson, above n48, at 23.

<sup>57</sup> The principle of functionality in comparative law and the methods of comparative law in general is discussed extensively in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> ed, Oxford University Press, 1998) at 34-35.

<sup>58</sup> Their AML laws are evaluated by the FATF to be “largely compliant” with the FATF recommendations (see FATF (2010), “Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of

traditions with Vietnam, particularly in terms of criminal laws.<sup>59</sup> Russia and Vietnam may face the same problems when implementing the international AMLs, which also adds value to the comparison.

Another rationale for the comparison with those States is that when using comparative law in making or revising laws, legislators often take into account other States whose legal system, language and legal tradition is familiar to their own to assess harmonization of the chosen solution with international practice.<sup>60</sup> This practice is true in the case of Vietnam. It should be recognized that many Vietnamese legislators were educated in France, the former Soviet Union, and recently in Germany, the US and the UK.

Furthermore, in transitional countries like Vietnam, lawmakers usually receive support in drafting legislation from foreign donors.<sup>61</sup> As a result, they tend to opt either for “the cost-saving transplant” or for “the externally-dictated transplant”.<sup>62</sup> According to “the cost-saving transplant” approach, the legislative drafters of the host country simply adopt the approach of the donor country for saving time and money.<sup>63</sup> “The externally-dictated transplant” involves a foreign individual, entity or government that indicates the adoption of a foreign legal model as a condition for doing business or for receiving other incentives.<sup>64</sup> Currently, the United Nations Development Programme (UNDP), the United Nations Office on Drugs and Crime (UNODC) and EU is vigorously supporting Vietnam in the reform of its criminal laws.<sup>65</sup>

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Terrorism (Germany)”, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Germany%20full.pdf> (accessed 19 August 2013); and FATF (2011), “Mutual Evaluation of France”, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20France%20ES%20ENG.pdf> (accessed 19 August 2013)).

<sup>59</sup> The development of Vietnam’s criminal law was influenced substantially by the former Soviet Union. This will be highlighted in chapter 4.

<sup>60</sup> More discussion of this practice can be found in Xanthaki, above n53. This author recommends and discusses the principal criteria when opting legal systems as legal sources for legal transplants in developing countries.

<sup>61</sup> This has been examined by Esin Örüçü, “Law as Transposition” (2002) 51 *International and Comparative Law Quarterly* 205 at 219. John Gillespie also examined the significant involvement of foreign donors in some legislative drafting projects in Vietnam (see Gillespie, above n48, at 235-242).

<sup>62</sup> These two approaches are coined by Jonathan M Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (2003) *The American Journal of Comparative Law* 839 at 845 and 847.

<sup>63</sup> Jonathan M Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (2003) *The American Journal of Comparative Law* 839 at 845.

<sup>64</sup> Miller, above n62, at 847.

<sup>65</sup> See UNDP (2013), “First Legal Policy Dialogue in 2013: “Criminal Laws of Viet Nam in the Context of International Integration””, available at: <http://www.vn.undp.org/content/vietnam/en/home/presscenter/pressreleases/2013/08/29/first-legal-policy-dialogue-in-2013-criminal-laws-of-viet-nam-in-the-context-of-international-integration/> (accessed 3

Thus, the US, the UK, France and Germany are the appropriate national criminal law sources for the legal comparison in this thesis.

### **1.6.3 General Methodologies**

Generally speaking, the thesis belongs to the category of international and comparative legal research.<sup>66</sup> The thesis adopts a number of methodologies often used in international law and comparative law research to deal with the research questions in each chapter.<sup>67</sup> The overarching methodologies are: treaty interpretation rules,<sup>68</sup> a “black-letter” positivist analysis and comparative legal analysis. Most chapters (chapters 4-9) adopt more than one of these methodologies in the description of a category of international AMLSs, and in the evaluation of its implementation by Vietnam and other selected States.

Each chapter usually involves the interpretation of provisions of relevant bilateral or multilateral treaties. This interpretation is, of course, subject to the rules provided for in article 31 of the 1969 Vienna Convention,<sup>69</sup> which states that the treaty in question is required to be “interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose”. Vietnam has become a Party to the 1969 Vienna Convention since 2001.

A “black-letter” positivist analysis (or doctrinal analysis) pays attention to detailed expositions of the law by clarifying the language of statutes and making reference to appropriate cases.<sup>70</sup> This method is often employed in the thesis (chapters 4-8) to analyse provisions of statutes and their rationale in common law States. The same approach, but

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January 2014); UNODC (2013), “UNODC and VN Collaborate on UNTOC Implementation”, available at: <http://www.unodc.org/southeastasiaandpacific/en/vietnam/2013/11/untoc/story.html> (accessed 3 January 2014); and “Justice Partnership Programme (Vietnam, EU, Denmark and Sweden)”, available at: <http://www.jppvietnam.org/> (accessed 20 February 2014).

<sup>66</sup> According to Michael MacConville and Wing Hong Chui (eds) *Research Methods for Law* (Edinburgh University Press, 2007) at 4-7, basically, there are three types of legal research: i) doctrinal research; ii) empirical legal research/socio-legal studies; and iii) international and comparative legal research.

<sup>67</sup> The author of this thesis agrees that “legal research projects do not always adopt a pure version of just one theoretical or methodological perspective”. See Robert Cryer, et al., *Research Methodologies in EU and International Law* (1<sup>st</sup> ed, Hart Publishing, 2011) at 4.

<sup>68</sup> More about methodologies for international law research can be found in Stephen Hall, “Researching International Law” in Michael MacConville and Wing Hong Chui (eds) *Research Methods for law* (Edinburgh University Press, 2007).

<sup>69</sup> *Vienna Convention on the Law of Treaties* 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980 (1969 Vienna Convention).

<sup>70</sup> MacConville and Chui, above n66.

mainly based on textual analysis, is used to explain, compare, evaluate and suggest for reform (or further development) of Vietnamese laws.

Comparative legal analysis is conducted to explore the differences in the implementation of AMLs in various jurisdictions, and most importantly to draw a realistic model of the implementation for Vietnam. In each chapter, the comparative legal analysis includes a critical evaluation of discoveries made, comments and proposals for law reform or new interpretations.<sup>71</sup> The evaluation focuses on whether the law is fair, vague or consistent with its application.

Apart from the dominant aforementioned methodologies, a socio-legal methodology with the use of limited empirical research (e.g., case studies, data collection, interviews or observations) is also used to conceptualize money laundering and assess the money laundering situation of Vietnam (chapter 2), or to identify gaps between “law in the books” and “law in action” in some chapters.

#### ***1.6.4 Research Difficulties***

It should be noted that very unfortunately there has not yet been any publication of official statistics or reported cases of money laundering in Vietnam thus far. There is negligible empirical research on crimes associated with money laundering, money laundering itself and AML in Vietnam. This has forced the author of this thesis to gather material from whatever sources he could find, and when there are none, to engage in comparison with similarly placed States, or even to speculate.

In addition, it is extremely difficult to access the full details of criminal cases in Vietnam. Access to cases of transnational crimes or cases related to a “foreign element” (e.g., the crime committed by a foreigner) is usually restricted. All criminal cases in Vietnam used in this thesis have not been publicly reported in full detail, the author describes these cases mainly based on information from the public media.

Since there has been no official English version of the Vietnamese laws discussed in this thesis, the author has had to translate a number of excerpts by himself with reference to some previous translation in different sources.<sup>72</sup> It is worth noting that the difficulty of a legal translation does not primarily depend on linguistic differences, but rather on structural

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<sup>71</sup> This is also the general objective of a comparative law research project. See Zweigert and Koetz, above n57.

<sup>72</sup> For example, the translation provided by Terrorism Prevention Branch (UNODC), “Electronic Legal Resources on International Terrorism”, available at: <https://www.unodc.org/tldb/>; and by APG, above n9.

differences between legal systems.<sup>73</sup> The translator must understand a source text in the source legal system (which is to be translated) and a target source in the target legal system (which is the result of the actual translation process).<sup>74</sup> In this thesis, the source legal system is Vietnamese law and the target legal system is international law and English law. Where there is no equivalent English legal term, the thesis has opted to cite the non-translated term, paraphrase, or create a neologism.

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<sup>73</sup> Marcus Galdia, “Comparative Law and Legal Translation” (2013) 1 The European Legal Forum 1 at 2.

<sup>74</sup> Ibid, at 1.

**Chapter 2**  
**MONEY LAUNDERING IN GENERAL**  
**AND WITHIN THE VIETNAMESE CONTEXT**

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**2.5 Money Laundering in General**

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**2.1 Introduction**

This chapter looks at the general aspects of money laundering itself and the money laundering situation in Vietnam. The chapter will first examine briefly: the conception of money laundering, the money laundering mechanisms and typologies, the trends, the harms and risks of harm caused by money laundering, and methods for measuring the scale of money laundering and assessing national money laundering threats. Armed with these perceptions of the nature of money laundering, an overview of money laundering within the Vietnamese context is then provided.

In this chapter, it is argued that money laundering activities cause harms or create risks of harm thus justifying criminalization, and that money laundering threats in Vietnam is significant. Therefore, it is necessary to establish a comprehensive anti-money laundering (AML) legal framework in Vietnam.

## 2.2 Money Laundering in General

### 2.2.1 *The Conception*

Although the term “money laundering” is relatively new, some authors argue that its practice is not.<sup>1</sup> R.T. Naylor illustrates how processes like money laundering were conducted in medieval Europe. These processes aimed at disguising and giving a legal appearance to money generated from usury, unreasonably high interest charges on a loan, that was a sin rather than a crime prohibited at that time.<sup>2</sup> The other patterns of early “money laundering” activities describe how merchants hid their profits from local authorities, for example, by exaggerating exchange rates to cover interest, and how pirates hid a portion of stolen property before restoring its legitimacy.<sup>3</sup> In modern society, diverse and more complex money laundering methods have been used to disguise illicit funds and make them appear legitimate.

The term “money laundering” is considered by some to have been originally used by American police in the 1920s in the United States (US) with reference to Al Capone and other Chicago gangsters.<sup>4</sup> It is argued by others to have first appeared in connection with the Watergate scandal in the US in 1973.<sup>5</sup> Whatever is true, there is robust evidence that it was first used as a legal term in the 1970s to describe the process of transforming drug trafficking proceeds into legitimate capital.<sup>6</sup> It has been used extensively as a legal term in relevant legislation and legal texts ever since. In 1985, a formal definition was given by the American President’s Commission on Organized Crime as following: “money laundering is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate”.<sup>7</sup> After that, many academics, professionals, and organizations have defined and clarified the act of money laundering in their own words. For example, “money laundering is the conversion of illicit cash to another

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<sup>1</sup> R.T. Naylor, *Wages of Crime : Black Markets, Illegal Finance and the Underworld Economy* (Cornell University Press, 2002) at 342.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Peter Lilley, *Dirty Dealing: The Untold Truth about Global Money Laundering, International Crime and Terrorism* (3<sup>rd</sup> ed, Kogan Page Limited, 2006) at 5.

<sup>5</sup> Robinson Jeffrey, *The Laundrymen - Inside Money Laundering, The World's Third Largest Business* (Arcade Publishing, 1997) at 6-9.

<sup>6</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) at 82.

<sup>7</sup> US President's Commission on Organized Crime, *"The Cash Connection: Organised Crime, Financial Institutions, and Money Laundering"* (Interim Report to the President and the Attorney General, 1984) at 7, available at: <https://www.ncjrs.gov/pdffiles1/Digitization/166517NCJRS.pdf> (accessed 08 July 2014).



asset, the concealment of the true source of ownership of the illegally acquired proceeds, and the creation of the perception of legitimacy of source and ownership”,<sup>8</sup> or money laundering is “any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources”.<sup>9</sup> In these definitions, the term “proceeds” was used to refer to any properties derived from or obtained, directly or indirectly, through the commission of criminal activities. These properties may be purchased with and be traceable to criminal profits. The term “proceeds” has been used and distinguished from “profit” of crime (proceeds minus costs) in US legislation since the early 1980s.<sup>10</sup> It has been internationally defined and used in association with the criminalization of money laundering since the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention).<sup>11</sup>

Though the definitions differ in their terms, it is clear that the main purposes of money laundering are to conceal the illicit origin of the proceeds of illegal activities and to acquire an apparently legal source for these proceeds. These illegal activities are commonly confined to criminal activities, and do not include civil wrongs. Thus, money laundering is generally understood as the process of converting the proceeds derived from a wide-range of underlying criminal offences (called predicate offences) to legitimate and apparently legal property. Criminals engage in money laundering in order to ensure the secure ownership of the proceeds and to shield the proceeds from suspicion, investigation and seizure. In order to obtain these objectives, highly sophisticated money laundering processes have been developed which are usually described as having three major sequential stages: placement, layering and integration.<sup>12</sup>

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<sup>8</sup> M. E. Beare, et al., *Tracing of Illicit Funds : Money Laundering in Canada* (Solicitor General Canada, 1990) at x, note 1 (as cited in William C. Gilmore (ed) *International Efforts to Combat Money Laundering* (Grotious Publication Ltd, 1992) at x).

<sup>9</sup> The definition was provided by the International Police Organization (INTERPOL) General Assembly in 1995. See INTERPOL (2010), “Funds derived from criminal activities”, available at: <https://secure.interpol.int/Public/FinancialCrime/MoneyLaundering/default.asp> (accessed 11 May 2013).

<sup>10</sup> David J. Fried, “Rationalizing Criminal Forfeiture” (1988) 79(2) *Journal of Criminal Law and Criminology* 328 at 374-375.

<sup>11</sup> See *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990, article 1(p).

<sup>12</sup> See, e.g., William C. Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4<sup>th</sup> ed, Council of Europe, 2011), at 34. However, Koningsveld asserts that money laundering consists of four stages which are placement, layering, justification and investment (see Jan van Koningsveld, “Money Laundering - "You Don't See It, until You Understand It": Rethinking the Stages of the Money Laundering Process to Make Enforcement more Effective” in Brigitte Unger and Daan Van der Linde (eds) *Research Handbook on Money Laundering* (Edward Elgar Publishing, 2013) at 439-441).

*Placement* involves the movement of the proceeds of crime to a secure place, or into a less suspicious form. Commonly, launderers introduce the proceeds into the financial system. For example, proceeds in the form of cash may be deposited in bank accounts opened under different names.

*Layering*: Launderers engage in a series of conversions or movements of the proceeds far from the point of its origin to obscure its origins and hide its true nature, for example, by transacting the funds through several accounts at different banks, or using shell corporations.

*Integration*: Launderers re-introduce the proceeds into the legitimate economy, for example, by investing in real estate, luxury assets or business ventures.

In practice, not all money laundering processes involve all three stages; some may involve more and some less.<sup>13</sup> These stages can be separate and distinct, but more often some of them are conducted simultaneously or overlap.<sup>14</sup>

In short, although the precise academic definition of money laundering remains elusive, money laundering can be identified and distinguished from other illegal activities by its main purpose of disguising the origin of funds derived from criminal activities.

### **2.2.2      *Mechanisms and Typologies of Money Laundering***

The proceeds of crime can be laundered through diverse mechanisms using different methods (also called typologies or techniques). The mechanisms and typologies of money laundering are progressive, and vary from time to time. In general, money laundering can be carried out through three categories of mechanisms ranging from very traditional to advanced ones: the physical movement of money or monetary instruments; the use of financial institutions; and the use of the trade system.<sup>15</sup> The major money laundering mechanisms are identified as follows.

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<sup>13</sup> Petrus C van Duyne and Michael Levi, *Drugs and Money: Managing the Drug Trade and Crime Money in Europe* (Routledge, 2005) at 152-155.

<sup>14</sup> Doug Hopton, *Money Laundering : A Concise Guide for All Business* (Gower Publishing Limited, 2006) at 2.

<sup>15</sup> The mechanisms and typologies of money laundering are often updated by the Financial Action Task Force (FATF) in its reports of typologies, based on the analysis of various typical cases from around the world. These reports have been made public since 1995. See all reports (1995-2011) at APG, “FATF Typologies Work”, available at: <http://www.apgml.org/frameworks/default.aspx?FrameworkID=5> (accessed 15 May 2013).

### *Currency, gold, precious metals and precious stones smuggling*

This is one of the oldest traditional money laundering mechanisms, but is still in use. By this mechanism, the proceeds of crime in the form of cash, gold, precious metals, precious stones or monetary instruments are covertly moved across the border, and then deposited in banking institutions, invested in legal business, used to purchase real estate and so on.

Gold, precious metals and precious stones attract money launderers because of their distinct advantages: their high intrinsic value, their convertibility and the potential anonymity of the parties engaged in transactions.<sup>16</sup> They themselves may be the proceeds of crime which need to be laundered through smuggling or illegal trading. In addition, the gold, precious metal or precious stones purchases and sales may be used as a cover for the laundering operation.

### *Money laundering through the banking sector*

Money laundering through banking institutions appears to be the most popular mechanism because of its numerous advantages. For instance, banks with their own principles of banking secrecy can provide multiple services to dispose of criminal proceeds safely, such as deposits, loans, and foreign exchange services. Further, the funds can be transferred promptly by various convenient ways through both domestic and overseas banking institutions, such as by the use of internet banking, phone banking and automatic teller machines (ATM). The typical typologies of this mechanism are the use of accounts in false names, or in the name of person operating on behalf of some other beneficiary.<sup>17</sup> In the layering stage, the transaction may involve multiple accounts in the names of multiple persons, businesses or shell companies.<sup>18</sup>

### *Money Laundering through Alternative Remittance Systems (ARSs)*

An “alternative remittance system” is also variously referred to as an “informal funds transfer”, “underground banking system”, “informal remittance centre” or “parallel banking

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<sup>16</sup> FATF (2003), “Report on Money Laundering Typologies 2002-2003”, available at: [http://www.fatf-gafi.org/media/fatf/documents/reports/2002\\_2003\\_ML\\_Typologies\\_ENG.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/2002_2003_ML_Typologies_ENG.pdf) (accessed 28 April 2013).

<sup>17</sup> FATF (1997), “1996-1997 Report on Money Laundering Typologies”, available at: <http://www.apgml.org/frameworks/docs/5/FATF%20Typologies%20rpt%201996-97.pdf> (accessed 28 April 2013).

<sup>18</sup> Shell companies usually exist on paper only, without real employees or offices, and with no significant assets or operations. They have legitimate uses, normally serving as the vehicles for business transactions. These companies also can be used at the placement stage of money laundering to receive deposits of cash which are then often sent to another country.

system”.<sup>19</sup> In the practice of particular ethnic or migrant groups, these systems are called by different names, such as the Indian *hawala/hundi* system, the Chinese *fei chi'en* system or the Colombian black market peso exchange.<sup>20</sup> Most ARSs operate in a similar way as conventional banks, which are used to transfer funds from one location to another without the physical movement of currency.

Although there is not yet a broad consensus about the definition of an ARS, there is basic agreement on its characteristics. The ARS usually operates in secrecy, depending on personal contacts and trust, and keeping limited records. Taking the Asian ARSs with the *hawala/hundi* and the *fei chi'en* systems as examples, money senders do not need to provide their names and identity nor that of recipients; instead, they are given codes, which are what the recipients have to show the corresponding brokers as proof in order to claim cash.<sup>21</sup> ARSs mostly operate outside national financial regulation, although they are largely composed of legitimate operators. ARSs may be effective and efficient. They may save the cost and time of transactions in many ways, for example, by circumventing national currency controls or requirements. Thus, many people prefer to use ARSs for transferring money to their families or for business purposes.

ARSs obviously offer many advantages for money launderers to transfer and disguise the proceeds of crime. For example, ARSs can obscure the audit trail of criminal proceeds effectively because of the absence of the bureaucratic procedures in paper work found in formal financial transaction systems. In addition, money launderers have developed numerous sophisticated typologies to launder the criminal proceeds through ARSs, such as using digital currency created as a medium of exchange on the Internet.<sup>22</sup>

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<sup>19</sup> A summary of how this system works can be found at FATF (2005), *"Money Laundering & Terrorist Financing Typologies 2004-2005"* at 3-13, available at: [http://www.fatf-gafi.org/media/fatf/documents/reports/2004\\_2005\\_ML\\_Typologies\\_ENG.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/2004_2005_ML_Typologies_ENG.pdf) (accessed 28 April 2013).

<sup>20</sup> FATF, *"Money Laundering & Terrorist Financing Typologies 2004-2005"* (10 June 2005) at 5, available at: [http://www.fatf-gafi.org/media/fatf/documents/reports/2004\\_2005\\_ML\\_Typologies\\_ENG.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/2004_2005_ML_Typologies_ENG.pdf) (accessed 28 April 2013).

<sup>21</sup> Abdullahi Y. Shehu, "The Asian Alternative Remittance Systems and Money Laundering" (2004) 7(2) *Journal of Money Laundering Control* 175 at 180.

<sup>22</sup> Some popular typologies are described in FATF, above n19, 14-26. One of the modern methods for money laundering through ARSs has been employed in the case *United States of America v. Liberty Reserve, et al.* (see Southern District Court of New York, *"Indictment & Supporting Documents: U.S. v. Liberty Reserve, et al. (sealed indictment)"* (28 May 2013) at 1-9, available at: <http://www.justice.gov/usao/nys/pressreleases/May13/LibertyReserveetalDocuments/Liberty%20Reserve,%20et%20al.%20Indictment%20-%20Redacted.pdf> (accessed 19 May 2014). According to the indictment, Liberty Reserve, incorporated in Costa Rica in 2006, was believed to be one of the world's most widely used alternative-payment networks using digital currency (from 2006 to May 2013). Through its website, Liberty Reserve was alleged to have been created and operated as a criminal business to facilitate criminals all over

### *Money laundering through the securities market*

Criminal funds laundered through the securities sector may be derived from criminal activities both inside and outside the sector. In case of the funds obtained within the sector itself, the predicate offences that generate these funds, can include embezzlement, insider trading, securities fraud, and market manipulation.<sup>23</sup>

A money launderer can use the securities market for all money laundering stages, but it is most commonly used for the layering or integration stage. The common money laundering typologies through the securities sector are:<sup>24</sup> the acceptance of cash payment in the securities market by unscrupulous securities market professionals (placement stage); the purchase of securities with criminal funds that have already introduced into the financial system (layering stage); and the setting up of legitimate public companies as a front for money laundering operations and then using the companies to co-mingle criminal proceeds with legal trade activities (integration stage).

### *Trade-based money laundering*

Trade-based money laundering refers to the mechanism for disguising and legitimizing the proceeds of crime through the use of international trade. Normally, international trade involves a large quantity and value of goods, and comprises multiple links to freight, to insurance, and to foreign currency exchange. Moreover, international trade often involves different national legal and financial systems. These characteristics can offer a superior cover

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the world conduct illegal transactions and launder the proceeds of their crimes. Liberty Reserve was assumed to have laundered more than US\$6 billion of criminal proceeds. Its operation can be summarized as follows. A user first was required to open an account with Liberty Reserve via its website, providing them with the basic identification, which could be fictitious or anonymous identities. The key characteristic was that Liberty Reserve only took deposits in its own digital currency (called "LR"). The user couldn't deposit money directly into the account. Instead, the user had to work through a third-party called "exchangers." These were typically unlicensed money transmitting business, who bought "LR" from Liberty Reserve. The user would pay Liberty Reserve in mainstream currency (US\$ or whatever currency) for a certain amount of LR, which then was deposit into the user's account. The user could then transfer "LR" to other users, including any "merchants" that accepted "LR" as a payment instrument. When the user wanted to withdraw money, the process worked in reverse, often with an "exchanger" in a different country. By this way, the user can hide all his information. Liberty Reserve had no record of how or from where the user sent the money, since the deposits and withdrawals were all done through the "exchangers". This arrangement obviously can be easily used for money laundering.

<sup>23</sup> Three predicate offences for money laundering linked to securities, namely inside trading, securities fraud and market manipulation, are described briefly in FATF, *"Money Laundering and Terrorist Financing in the Securities Sector"* (October 2009) at 48-54, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20in%20the%20Securities%20Sector.pdf> (accessed 28 April 2013).

<sup>24</sup> FATF, above n16, at 11-18.

to the criminal proceeds, especially in developing countries with limited resources for scrutinizing international trade. For example, criminal funds can be laundered through the misrepresentation of the price, quantity or quality of imports or exports. The basic typologies include: over- or under-invoicing of goods and services; multiple invoicing of goods and services; over-and under-shipments of goods and services; and falsely described goods and services.<sup>25</sup>

Furthermore, the globalization of capital markets has presented a great opportunity for money launderers. It is evident that foreign direct investment (FDI) facilitates money laundering, especially in transitional economies.<sup>26</sup> For example, the establishment of foreign companies constitutes a movement of capital from the home country to the host country that may be commingled with criminal assets. Thus, FDI may disguise investor's illicit assets. The typologies of trade-based money laundering can be used when laundering criminal funds through FDI.

In addition to the money laundering typologies described above, the proceeds of crime can be laundered through other channels, such as the insurance sector,<sup>27</sup> the real estate sector,<sup>28</sup> and the casino and gaming sector.<sup>29</sup>

### **2.2.3 Trends in Money Laundering**

#### *The increase in transnational money laundering*

Modern technologies, advanced means of transportation and advances in financial transaction systems (e.g., the internet banking), have enabled money launderers to transfer criminal proceeds abroad more promptly and safely. In addition, the globalization of the economy has facilitated cross-border financial transactions and trade among countries. Money launderers utilize this context to move the proceeds of crime rapidly through multiple

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<sup>25</sup> APG (2012), "APG Typology Report on Trade Based Money Laundering" at 3, available at: [http://www.fatf-gafi.org/media/fatf/documents/reports/Trade\\_Based\\_ML\\_APGReport.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Trade_Based_ML_APGReport.pdf) (accessed 28 April 2013).

<sup>26</sup> M Fabricio Perez, Josef C Brada and Zdenek Drabek, "Illicit money flows as motives for FDI" (2012) 40(1) Journal of Comparative Economics 108 at 110-111.

<sup>27</sup> FATF (2004), "Report on Money Laundering Typologies 2003-2004" at 15-18, available at: [http://www.fatf-gafi.org/media/fatf/documents/reports/2003\\_2004\\_ML\\_Typologies\\_ENG.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/2003_2004_ML_Typologies_ENG.pdf) (accessed 16 May 2013).

<sup>28</sup> FATF (2007), "Money Laundering & Terrorist Financing through the Real Estate Sector" at 7-27, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20through%20the%20Real%20Estate%20Sector.pdf> (accessed 28 April 2013).

<sup>29</sup> APG/FATF (2009), "Vulnerabilities of Casinos and Gaming Sector" at 27-45, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf> (accessed 16 May 2013).

jurisdictions. The destination countries for the funds are often developing countries with lax money laundering controls, including Vietnam.<sup>30</sup> Law enforcement agencies face numerous challenges when following, detecting and seizing the funds laundered across national boundaries.<sup>31</sup>

#### *The tendency towards professionalization of money laundering*

The development of sophisticated AML measures has coincided with a tendency for the separation between criminals generating illegal proceeds and others laundering these proceeds. The criminals need the aid of professional money launderers or money laundering facilitators, who have the competent legal, financial and technological knowledge to avoid detection. Hence, there has been an increasing involvement of professions in money laundering, such as accountants, lawyers, financial advisors, notaries and other fiduciaries.<sup>32</sup> These people have taken advantage of their high social status, their professions and their technical competency within their specific services to conduct or support money laundering.

#### *Cyber money laundering*

Cutting-edge technologies, especially the Internet and wireless telecommunications, have been utilized effectively in money laundering. The advantages offered by cyber laundering include: a potential high degree of anonymity, high speed of transaction, and cross-border challenges to law enforcement.<sup>33</sup> Money launderers can exploit a variety of services available on the internet for money laundering, for example, internet payment services, stored value cards (known as smart cards), online banking, online gambling, and online auctions.<sup>34</sup>

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<sup>30</sup> In the case *United States of America v. Liberty Reserve, et al* described above, for example, the “exchangers” were found to be located mainly in Malaysia, Russia, Nigeria and Vietnam where unlicensed money transfer businesses could operate without significant oversight or regulation (See Southern District Court of New York, above n22, 9).

<sup>31</sup> The challenges of international cooperation in AML will be discussed in the later chapters.

<sup>32</sup> FATF, above n16, at 5.

<sup>33</sup> Wojciech Filipkowski, “Cyber Laundering: An Analysis of Typology and Techniques” (2008) 3(1) *International Journal of Criminal Justice Sciences* 15.

<sup>34</sup> Description of how these services are used for money laundering can be found in *ibid*, at 17-24; and FATF (2006), “*Report on New Payment Methods*” at 4-9, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Report%20on%20New%20Payment%20Methods.pdf> (accessed 20 November 2013).

Virtual currencies (or digital currencies),<sup>35</sup> for example Bitcoin or Linden dollar,<sup>36</sup> offer highly anonymous and instant money transfers that make them attractive for criminals, especially money launderers, and challenges the current AML system.<sup>37</sup> The US Federal Bureau of Investigation (FBI) notes that “Bitcoin will likely continue to attract cyber criminals who view it as a means to move or steal funds as well as a means of making donations to illicit groups”.<sup>38</sup>

#### 2.2.4 *The Harms of Money Laundering*

This section examines the harms and risks of harm caused by money laundering. Then it argues that money laundering acts cause harms or create risks of harm thus justifying criminalization on the basis of the “Harm Principle”. Ashworth interprets this principle as follows “the State is justified in criminalizing any conduct that causes harm to others or creates an unacceptable risk of harm to others”.<sup>39</sup>

The FATF has identified the overall harms associated with money laundering and believes that these harms are self-explanatory.<sup>40</sup> It, however, appears that identifying and illustrating the harms of money laundering is a difficult and controversial task. Several scholars and institutions have employed different approaches to identify the negative effects of money

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<sup>35</sup> See its definition in FATF (2014), *Virtual Currencies Key Definitions and Potential AML/CFT Risks* at 4-7, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> (accessed 01 July 2014).

<sup>36</sup> See how these types of currencies can be misused for money laundering in , e.g., Robert Stokes, “Virtual Money Laundering: the Case of Bitcoin and the Linden Dollar” (2012) 21(3) *Information & Communications Technology Law* 221 at 223-226; and Clare Chambers-Jones, *Virtual Economies and Financial Crime: Money Laundering in Cyberspace* (Edward Elgar Publishing, 2012) at 104-112.

<sup>37</sup> See further in Dionysios S. Demetis, *Technology and Anti-money Laundering: A Systems Theory and Risk-based Approach* (Edward Elgar Publishing, 2010) at 8-13; Robert Stokes, “Anti-Money Laundering Regulation and Emerging Payment Technologies” (2013) 32(5) *Banking and Financial Services Policy Report* 1 at 4-6; and Danton Bryans, “Bitcoin and Money Laundering: Mining for an Effective Solution” (2014) 89(1) *Indiana Law Journal* 441 at 455-469.

<sup>38</sup> Cyber Intelligence Section and Criminal Intelligence Section FBI Directorate of Intelligence, “(U) Bitcoin Virtual Currency: Intelligence Unique Features Present Distinct Challenges for Deterring Illicit Activity” at 2, available at: [http://www.wired.com/images\\_blogs/threatlevel/2012/05/Bitcoin-FBI.pdf](http://www.wired.com/images_blogs/threatlevel/2012/05/Bitcoin-FBI.pdf) (accessed 19 May 2014).

<sup>39</sup> Andrew Ashworth, *Principles of Criminal Law* (6<sup>th</sup> ed, Oxford University Press, 2009) at 27. Chapter 4 will look at the criminalization of money laundering in detail.

<sup>40</sup> FATF (2010), *Global Money Laundering & Terrorist Financing Threat Assessment* at 12, available at: [https://www.imolin.org/pdf/imolin/Global\\_Threat\\_assessment.pdf](https://www.imolin.org/pdf/imolin/Global_Threat_assessment.pdf) (accessed 19 June 2014).



laundering on different aspects of society,<sup>41</sup> and controversy has arisen surrounding their discussions.<sup>42</sup>

One justification for criminalization relates to the negative economic impact of money laundering. But in terms of the economic impact, some authors have expressed doubt about the real negative effects of money laundering on economic development within a national economy.<sup>43</sup> In developing countries, it is even claimed that the proceeds of crime provide useful funds for economic development, and that their capital may not be spent most effectively because of regulation of money laundering.<sup>44</sup> In fact, these claims may be true in the short term (e.g., banks may benefit from increased business through money laundering), but in the long run, this thesis accepts that the micro- and macro-economic harm of money laundering is obvious.<sup>45</sup> The primary economic harms can be identified as follows:

*Money laundering may undermine the integrity of financial institutions as well as the credibility and transparency of the financial market.*<sup>46</sup>

The review of money laundering mechanisms and typologies indicate that money launderers frequently make use of financial institutions, including banks and non-banking financial institutions, for their operations. The fraudulent activities of money launderers or corrupt individuals within these institutions may cause an increase in operational risk or

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<sup>41</sup> Durrieu offers an extensive literature review on the discussion of the harms money laundering may cause. See Roberto Durrieu, *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (Martinus Nijhoff, 2013) at 78-93.

<sup>42</sup> See, for instance, Hans Geiger and Oliver Wuensch, "The Fight against Money Laundering: An Economic Analysis of a Cost-Benefit Paradoxon" (2007) 10(1) *Journal of Money Laundering Control* 91; and Peter Alldridge, *Money Laundering Law Forfeiture, Confiscation, Civil Recovery, Criminal Laundering, and Taxation of the Proceeds of Crime* (Hart Publishing, 2003) at 29-43. Alldridge has examined the arguments presented by economists about the economic harm of money laundering and suggested that "many of the minor arguments for the existence of harms are incorrect or inconsequential" (at 42).

<sup>43</sup> For example, Alldridge argues that in a single jurisdiction, the justification for the regulation of money laundering is not strong. See Alldridge, above n42, at 30.

<sup>44</sup> Peter W. Alldridge, "Money Laundering and Globalization" (2008) 35(4) *Journal of Law and Society* 437 at 446.

<sup>45</sup> In a comprehensive research project on "The Amount and the Effects of Money Laundering" for the Dutch Ministry of Finance, the economic effects are the majority among 25 identified different negative effects of money laundering. See Brigitte Unger and Elena Madalina Busuioc, *The Scale and Impacts of Money Laundering* (Edward Elgar Publishing, 2007) at 109-173.

<sup>46</sup> This argument is supported by most scholars and institutions. For example, see P.J. Quirk, "Macroeconomic Implications of Money Laundering" WP/96/66, IMF, Washington D.C., 1996, at 27-28; and Durrieu, above n41, at 80-89.

reputational risk.<sup>47</sup> Furthermore, investors and general public will lose their trust in the financial system which is contaminated or even controlled by money launderers.

*Money laundering may depress productivity and distort fair competition.*<sup>48</sup>

Criminal funds can be integrated into the legitimate economy as legal investment capital in business ventures or through buying luxury commodities. However, this investment can be “sterile investment”,<sup>49</sup> which is made for the purpose of laundering criminal proceeds rather than maximizing the profit of enterprises, or generating additional productivity for society. “Sterile investment” may allow the companies to provide products or services below market rates or push the price up. This distorts fair competition in legitimate markets.

*Money laundering may result in loss of economic policy control.*<sup>50</sup>

An enormous amount of laundered funds introduced into a small national economy can contribute to monetary instability through, for example, the instability of exchange rates, interest rates, or inflation. This may derive from inexplicable change in money demand, volatility of capital flows, the misallocation of resources, and from artificial distortion in commodity prices.<sup>51</sup> In addition, misleading information about money transactions given to policymakers may contribute to inaccurate economic management that may cause macroeconomic instability.

The other negative economic effects of money laundering are: the loss of tax revenue, risk to the process of privatization of state-owned enterprises in some countries undertaking economic reform, and the facilitation of capital flight.<sup>52</sup>

In addition to the negative impact on the economy, money laundering may harm other social aspects.

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<sup>47</sup> Brent L. Bartlett, *"The Negative Effects of Money Laundering on Economic Development"* Asian Development Bank, 2002, at 5.

<sup>48</sup> This negative effect was also proved by many scholars, e.g., Brigitte Unger, “The Impact of Money Laundering” in Donato Masciandaro, Előd Takáts, and Brigitte Unger (eds) *Black Finance: The Economics of Money Laundering* (Edward Elgar Publishing, 2007); *ibid*; and Quirk, above n46.

<sup>49</sup> See Bartlett, above n47.

<sup>50</sup> See Durrieu, above n41, at 81-82.

<sup>51</sup> John McDowell, Senior Policy Adviser and Gary Novis, “The Consequences of Money Laundering and Financial Crime” (2001) 6(2) *Economic Perspectives* at 3.

<sup>52</sup> See more economic effects discussed by Unger and Busuioc, above n45; and Bartlett, above n47, 29.

*Money laundering facilitates the increase in predicate offences.*<sup>53</sup>

Obviously, there is an inextricable link between money laundering and the underlying criminal activities that generate illicit proceeds. Money laundering fuels criminals by protecting their proceeds. Successful money laundering helps criminals enjoy their proceeds which may encourage them to commit further crimes.<sup>54</sup> The fact that criminals can easily convert, conceal or disguise their illicit proceeds may be one of the stimuli for the increased commission of some kinds of predicate crimes, such as drug trafficking and human trafficking. This is recognised in the Preamble of the 1988 Vienna Convention, which asserts that the State Parties to the convention are “determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing”.<sup>55</sup>

*Money laundering invites corruption,<sup>56</sup> erodes the integrity of law enforcement agencies, and undermines the rule of law.*

Consolidation of the economic power of criminals enables them to penetrate law enforcement agencies and the political system.<sup>57</sup> The Preamble of the 1988 Vienna Convention expressed the recognition by States that illicit drug traffic “generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels”.<sup>58</sup> Money launderers often use bribery to overcome obstruction in critical gateways, such as public officials and law enforcement agencies, in order to make money laundering successful. Money laundering also corrupts professionals, particularly legal professionals and accountants.<sup>59</sup> Furthermore, large-scale money laundering contributes to the economic and political influence of criminals on the society that threatens national security, the sovereignty of states and social well-being.<sup>60</sup>

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<sup>53</sup> This argument is also supported by many scholars, such as see Unger and Busuioc, above n45, at 160-169; and Durrieu, above n41, at 89-90.

<sup>54</sup> See more about this argument in, e.g., R. C. H Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Ashgate Publishing, 2007) at 24-27.

<sup>55</sup> See the Preamble of the *1988 Vienna Convention*, above n11, par. 6.

<sup>56</sup> See, e.g., Alldridge, above n42, at 33-34.

<sup>57</sup> See the explanation by, e.g., Angela Veng Mei Leong, *The Disruption of International Organised Crime: An analysis of Legal and Non-Legal Strategies* (Ashgate Publishing, 2007) at 40.

<sup>58</sup> *1988 Vienna Convention*, above n11, par. 5.

<sup>59</sup> See Alldridge, above n42, at 34-35.

<sup>60</sup> See more in Alldridge, above n44; and Durrieu, above n41, at 92.

Based on the above illustration, this thesis argues that the harms and risks of harm caused by money laundering activities is the fundamental rationale for the development of international AMLs, including the criminalization of money laundering, and for the implementation of these standards by all States.<sup>61</sup>

## **2.2.5      *Measuring the Scale of Money Laundering and Assessing National Money Laundering Threats***

### *Measuring the scale of money laundering*

It has been submitted by some scholars that a national estimate of money laundering volume appears to serve limited purposes, and is not important for the purpose of making the AML policy or for assessing the outcome of AML measures.<sup>62</sup> The FATF also agrees that the statistic of money laundering volume is not necessary to be able to recognise the harms caused and the need for global action.<sup>63</sup> According to those scholars, diverse predicate offences contribute different amounts to the total volume of money laundered, and different predicate offences cause different levels of harm which may not depend on whether they produce significant proceeds.<sup>64</sup> For example, drug trafficking may generate more proceeds than terrorism, but it does not mean that the former is more harmful than the latter. Thus, a reduction in the volume of money laundering may indicate a decline in the particular offences which usually make huge proceeds in a country, but cannot represent an increase in other predicate offences which can cause more serious harm.<sup>65</sup> As a result, they conclude that the reduction of money laundering volume cannot indicate that the associated harm has been managed or mitigated.<sup>66</sup> They may be right in this point. But the estimation of money laundering volume in a country does reflect whether money laundering activities increase, then helps the country to make an appropriate national AML strategy. This thesis argues that knowing the scale of money laundering within the national context and on a global level is helpful, for example, in evaluating the economic effect of money laundering. In addition,

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<sup>61</sup> The development of international AMLs and rationales for the implementation by States will be examined in chapter 3.

<sup>62</sup> See Michael Levi and Peter Reuter, "Money Laundering" (2006) 34(1) Crime and Justice 289 at 326-327; and Peter Reuter and Edwin M. Truman, *Chasing Dirty Money: The Fight against Money Laundering* (Peterson Institute, 2004) at 24.

<sup>63</sup> FATF (2010), above n40, at 10.

<sup>64</sup> Reuter and Truman, above n62, at 24.

<sup>65</sup> See Levi and Reuter, above n62, at 326-327

<sup>66</sup> Levi and Reuter, above n62.

although the estimation cannot provide a precise guide for making AML policies and laws, it contributes to the confirmation of whether the scale of money laundering is sufficient to warrant public attention to national AML policies and laws or not. In fact, however, quantifying the money laundering turnover is extremely difficult due to the lack of reliable methodologies. Some researchers, using their own methodologies, have estimated how much money has been actually laundered in some countries and globally. Unfortunately, most of the proposed methodologies seem to be flawed.<sup>67</sup> An obvious difficulty is that measuring money laundering implies measuring the incidence of all of the most serious crime that produces illicit proceeds. This thesis agrees that it seems impossible to know how much money has been laundered at a certain time.<sup>68</sup> What we can do is to offer a broad speculation about the extent of money laundering activities within a country and whether it increases. The speculation can be based upon the evaluation of some specific categories of predicate offences which are the main sources of criminal proceeds.<sup>69</sup>

At present, there is only an annual report of the US Department of State that assesses and classifies money laundering situation in most countries in the world. Depending mainly on the assessment of involvement of national financial institutions in narcotics trafficking, the US Department of State's annual International Narcotics Control Strategy Report (INCSR - the Money Laundering and Financial Crimes section) provides a classification of national money laundering situations.<sup>70</sup> The report provides an overview of AML/CFT (Countering the Financing of Terrorism) legal frameworks of more than 200 jurisdictions and countries. It

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<sup>67</sup> In John Walker and Brigitte Unger, "Measuring Global Money Laundering: "The Walker Gravity Model"" (2009) 5(2) Review of Law and Economics 821 at 827-829, and in Friedrich Schneider, "Turnover of Organized Crime and Money Laundering: Some Preliminary Empirical Findings" (2010) 144(3) Public Choice 473 at 474-477, the authors summarized and pointed out flaws in some primary proposed methods for estimating money laundering volume. In Peter Reuter, "Are Estimates of the Volume of Money Laundering either Useful or Feasible? " (Tackling Money Laundering, University of Utrecht, Utrecht, The Netherlands, 2007) at 4-8, the author was sceptical about the credibility of the "Walker Model" which has been considered as the most plausible model for measuring money laundering scale.

<sup>68</sup> Demetis also argues that it is beyond our capacity to have a clear understanding of money laundering volume. See Demetis, above n37.

<sup>69</sup> Reuter and Truman also employed this approach when estimating the demand for money laundering in the US. They named it as the microeconomic approach which focuses on estimating the incomes from different types of crime. See Reuter and Truman, above n62, at 19-23.

<sup>70</sup> This report is actually relied on the contributions of various US government agencies and international sources, such as: the Bureau for International Narcotics and Law Enforcement Affairs, the US Treasury Department's Financial Crimes Enforcement Network and Department of Homeland Security Investigations. The report also takes account of the mutual evaluation conducted by the FATF or the FATF-style regional bodies to which the countries or jurisdictions belong. See US Department of State, *"International Narcotics Control Strategy Report (INCSR): Volume II Money Laundering and Financial Crimes"* (March 2014) at 5-6, available at: <http://www.state.gov/documents/organization/222880.pdf> (accessed 10 April 2014).

also identifies the major money laundering countries. Nevertheless, the report does not quantify money laundering on either a national or global scale. The 2014 INCSR classifies jurisdictions into three categories: Countries/Jurisdictions of Primary Concern, Countries/Jurisdictions of Concern, and Other Countries/Jurisdictions Monitored.<sup>71</sup> “Countries/Jurisdictions of Primary Concern” are identified as “major money laundering countries”. Identification as “Countries/Jurisdictions of Primary Concern” is based on whether the country or jurisdiction’s financial institutions engage in transactions involving a significant amount of proceeds from all serious crimes or are vulnerable to such activities. “Countries/Jurisdictions of Concern” or “Other Countries/Jurisdictions Monitored” are classified upon several factors, such as the significance of financial transactions in the countries’ financial institutions involving the proceeds of serious crime, actions taken or not taken in AML and each country’s vulnerability to money laundering. According to the US Department of State, while the actual money laundering situations of “Countries/Jurisdictions of Concern” are not as serious as those of “Countries/Jurisdictions of Primary Concern”, the jurisdictions of concern still must develop or enhance their AML strategies.<sup>72</sup> In addition, although “Other Countries/Jurisdictions Monitored” do not pose an immediate concern, it is necessary to monitor their money laundering situations.<sup>73</sup> Because of its approach and methods, the INCSR provides a helpful source to access general national money laundering situations. More significantly, it has been used to rate Vietnam. In the 2014 INCSR, Vietnam is classified as a jurisdiction of concern.<sup>74</sup>

### *Assessing national money laundering threats*

Instead of attempting to quantify the value of money laundering activities, a number of countries based on their own approaches have conducted national money laundering threats/risks assessment.<sup>75</sup> In most of these countries, money laundering typologies and predicate offences are among the crucial factors which are taken into account the assessment of money laundering risks.

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<sup>71</sup> See US Department of State (2014), *"International Narcotics Control Strategy Report (INCSR): Volume II Money Laundering and Financial Crimes"* at 32-33, available at: <http://www.state.gov/documents/organization/222880.pdf> (accessed 10 April 2014). The number of countries or jurisdictions of these categories are 66, 68 and 76 relatively.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> See the approaches of, e.g., Australia, the Netherlands, Switzerland and the US in FATF (2013), *"National Money Laundering and Terrorist Financing Risk Assessment"* at 50-56, available at: [http://www.fatf-gafi.org/media/fatf/content/images/National\\_ML\\_TF\\_Risk\\_Assessment.pdf](http://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf) (accessed 23 July 2013).

In 2010, the FATF published the first Global Money Laundering and Terrorist Financing Threat Assessment (GTA) and proposed a general framework which can be used to identify the overall threats caused by money laundering at a global, regional and national level.<sup>76</sup> The analysis of money laundering typologies and of the major sources of criminal proceeds is one of the main bases for the GTA.

Furthermore, in 2013, in order to support countries in implementing the risk-based approach to their AML regimes,<sup>77</sup> the FATF introduced a more specific guidance paper on national money laundering and terrorist financing (ML/TF) risk assessment.<sup>78</sup> ML/TF risks, according to this guidance document, are conceptualized as a combination of threats, vulnerabilities and consequences.<sup>79</sup> This guidance suggests that an understanding of the environment in which predicate offences occur and the criminal proceeds are generated (and if possible the size) is an important starting point in assessing national ML risks.<sup>80</sup> The FATF recommends a list of predicate offences that may be useful in building an estimate of ML threats, which include drug-related crimes, organized crimes and corruption to name a few.<sup>81</sup> In practice, the size of these crimes and their proceeds varies from one country to another. Therefore, countries have different selected lists of predicate offences used to examine ML threats/risks.

Vietnam, thus far, has not undertaken a comprehensive assessment of ML threats/risks. In order to have an initial evaluation of ML threats in Vietnam, the following section provides insights into a number of categories of predicate offences.

### **2.3 Money Laundering within the Vietnamese Context**

The thesis does not expect to offer an accurate assessment of the national money laundering threats/risks in Vietnam. Rather it attempts to make a broad statement about the scale and tendency of ML activities and ML threats within Vietnam. As mentioned above, there has been no credible method for estimating the volume of money laundering in a country. Nevertheless, it is necessary and possible to give a speculation about the extent of

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<sup>76</sup> FATF (2010), above n40.

<sup>77</sup> This approach will be discussed in chapter 9.

<sup>78</sup> FATF (2013), above n75.

<sup>79</sup> Ibid, at 7. See more discussion about this in chapter 9.

<sup>80</sup> Ibid, Annex I.

<sup>81</sup> Ibid.

money laundering and the general assessment on money laundering threats through the examination of certain predicate offences, ML typologies and other key indicating factors.

This section first examines the extent of the following selected categories of predicate crimes: drug trafficking, corruption and organized crimes (including these crimes committed extra territorially but which fall within Vietnam's jurisdiction); as well as the associated money laundering activities. These crimes are chosen because they generate the most significant proceeds and are most likely to be associated with money laundering.<sup>82</sup> Some particular cases are provided as examples of the link between the predicate crimes and money laundering, and of the money laundering methods in Vietnam. Then, the facilitators of money laundering and possible typologies used in Vietnam are discussed.

### **2.3.1      *Selected Predicate Crimes and Associated Money Laundering Activities***

#### *Drug trafficking*

Vietnam's geographic location and insufficient law enforcement capacity to counter drug trafficking make it an attractive transit site for drug traffickers to smuggle drugs from the Golden Triangle, Cambodia and China to Australia, the US, Canada and to European countries.<sup>83</sup> Meanwhile, Vietnam is a prospective consumption market for drugs with an ever growing number of domestic drug users in recent years.<sup>84</sup> Drug trafficking-related crimes have increased at a very high rate recently.<sup>85</sup> A significant part of the proceeds generated from drug trafficking are believed to have been laundered in Vietnam using diverse typologies. The following case is a non-exhaustive example of such activity.

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<sup>82</sup> In Reuter and Truman, above n62, at 40-43, the authors also choose to analyse these crimes for purposes of understanding the effects of AML regime in the US.

<sup>83</sup> See UNODC (2013), *"Transnational Organized Crime in East Asia and the Pacific A Threat Assessment"* at vi, available at: [http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA\\_EAP\\_web.pdf](http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf) (accessed 22 May 2013); and U.S. Department of State, *"International Narcotics Control Strategy Report: Volume I Drug and Chemical Control"* (March 2013) at 318, available at: <http://www.state.gov/documents/organization/204265.pdf> (accessed 21 May 2013).

<sup>84</sup> US Department of State (2011), *"International Narcotics Control Strategy Report: Volume I: Drug and Chemical Control"* at 584, available at: <http://www.state.gov/documents/organization/156575.pdf> (accessed 21 May 2013).

<sup>85</sup> Between January and August 2012, there were 14,074 cases of drug trafficking detected involving 20, 576 suspects, a five- to seven- percent increase in activity in comparison with the same period in 2011. See U.S. Department of State, above n83.



### *Case 1*

In January 2007, the People's Court of northern Son La province handed down seven death sentences in the case of “*Trinh Nguyen Thuy*” (these were affirmed on appeal).<sup>86</sup> Thuy and his accomplices were found guilty of various charges related to the transnational illegal trading of heroin and opium, and producing heroin. This case is considered one of the largest drug-trafficking related cases ever brought before the Vietnamese courts. The case is notorious for the number of death sentences handed down, the huge amount of heroin and opium traded (about 250 kg heroin and 200 kg opium),<sup>87</sup> the bribing of high-ranking public officials, and especially for the link to an elaborate money laundering scheme. The investigation revealed that after roughly 20 years of involvement in drug trafficking, Thuy had earned a tremendous profit which was then invested mainly in real estate. At the time of his arrest in 2005, Thuy was the Chairman of the Board of a joint stock company and director of a front company. By bribing officials in the Ministry of Agriculture and Rural Development of Vietnam, his companies were granted permission to engage in a number of well-known real estate projects in Hanoi that helped him to cover his underlying criminal activities and launder criminal proceeds derived from the predicate crimes. Further, he also owned several private real properties and luxurious cars. Nevertheless, due to the inadequate legal framework in existence in Vietnam at that time, he and his accomplices were not accused of any charge in relation to money laundering.

### *Organized criminal groups*

Although Vietnam has become a Party to the United Nations Convention against Transnational Organized Crime (the Palermo Convention),<sup>88</sup> neither the term “organized criminal group” nor “transnational crime”, terms on which the Convention relies heavily, has been defined formally in Vietnamese laws. Nevertheless, Vietnamese analogues to organised

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<sup>86</sup> TTXVN (2010), “Thi hanh an tu hinh trum ma tuy Trinh Nguyen Thuy [Drug Boss Trinh Nguyen Thuy to be Executed]”, available at: <http://dantri.com.vn/c20/s20-412353/thi-hanh-an-tu-hinh-trum-ma-tuy-trinh-nguyen-thuy.htm> (accessed 3 May 2013)

<sup>87</sup> Hoang Khue (2007), “Ong trum Heroin o Viet Nam bi de nghi an tu hinh [A Vietnamese Drug Boss to be Suggested the Death Penalty]”, available at: <http://vnexpress.net/gl/phap-luat/2007/01/3b9f2b2e/> (accessed 22 May 2013)

<sup>88</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003. Vietnam ratified this convention in June 2012. Article 2(a) of the convention defines “organized criminal group” as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit. The definition of transnational crime will be examined in chapter 5.

crime and its features have been identified by Vietnamese law enforcement authorities and experts. Since the early 2000s, following the crackdown on a number of notorious organized criminal groups, other terms including “black society-style” (*xa hoi den*) crime and mafia-style crime have been widely used to describe serious organized criminal groups in Vietnam.<sup>89</sup> “Black society-style” crime is recognized as a close-knit gang associated with armed robbery, racketeering, smuggling, drug trafficking, prostitution, illegal gambling and even contract murder. Beyond the characteristics of “black society-style” crime, mafia-style crime is well-organized in its structure and operation. Mafia-style crime is increasing in Vietnam.<sup>90</sup> It possesses certain economic strengths gained through illegal activities and enjoys protection from public officials through bribery and threat. It causes serious harms to the society. Mafia-style criminals often engage with potentially lucrative business to cover their crimes, launder their proceeds and make more profits. Criminal proceeds generated by “black society-style” (*xa hoi den*) crimes and mafia-style crimes are normally used to buy real property, establish entertainment businesses (e.g., restaurants, hotels and discotheques), and invest in front companies.

### *Case 2*

In 2003, the extraordinary trial of the “*Nam Cam*” case which involved 155 defendants, the biggest case in the history of criminal procedure in Vietnam up to that time, shocked the Vietnamese public and seized a great deal of domestic and foreign media attention.<sup>91</sup> After more than 3 months of hearings, the Ho Chi Minh City People’s Court imposed the death penalty on southern mafia-style crime boss Truong Van Cam, better known by the nickname “*Nam Cam*”, and five of his associates (one death penalty on an accomplice was altered on appeal). “*Nam Cam*” was found guilty of numerous charges including murder, bribery and organizing illegal gambling. Sixteen officials, including two members of the Communist Party’s powerful Central Committee and several high-ranking police officers, were punished with prison terms. The indictment indicated that “*Nam Cam*” amassed a fortune during a decade at the top of an underground criminal network that consisted of gambling dens, loan

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<sup>89</sup> Hien Thanh (2012), “Quyet Liet Chong Toi Pham Hoat Dong Theo Kieu "Xa Hoi Den" [Intensive Countermeasures against "Black society-style" Crime]”, available at: <http://www.cand.com.vn/vi-VN/xahoi/2012/5/176092.cand> (accessed 3 May 2013).

<sup>90</sup> Hai Chau (2011), “Canh Bao Toi Pham Kieu Mafia Tiem An Tai Viet Nam [Warning the Potential Mafia-style Crime in Vietnam]”, available at: <http://phapluattp.vn/20110415124042714p0c1013/canh-bao-toi-pham-kieu-mafia-tiem-an-tai-vn.htm> (accessed 4 May 2013).

<sup>91</sup> John Gillespie (ed) *Changing Concepts of Socialist Law in Vietnam* (ANU E Press 2005) at 201 - 202.

sharks, protection rackets and prostitution rings. His criminal web spread from its Ho Chi Minh base to other southern provinces and the capital Hanoi, and attracted partners from Taiwan and Cambodia. It was suggested at the time of his arrest that “Nam Cam” raked in about US\$2 million per month from the protection of hundreds of restaurants, discos and illegal gambling clubs.<sup>92</sup> Nonetheless, when the police carried out a thorough search of his private houses, only VND750 million (about US\$37,000) was found. The investigation revealed that huge volumes of the proceeds of crime were primarily invested in several famous restaurants and discotheques in Ho Chi Minh City. A part of these proceeds was used for buying real estate and for bribery. Through his legal business, he had become a well-known and successful businessman in Ho Chi Minh City’s entertainment industry. However, only a small part of his criminal assets was confiscated after the conviction.

### *Corruption*

In 2013, Transparency International's Corruption Perceptions Index ranked Vietnam 116<sup>th</sup> out of 177 countries and territories (perceived level of public-sector corruption).<sup>93</sup> Corruption occurs systematically at almost all levels and in most society sectors, including the administrative, political, judicial, and economic sectors.<sup>94</sup> Both Vietnamese political leaders and the Vietnamese public have realised that corruption is a major threat to the leadership of the Communist Party and to the stability of the society. Corruption is becoming more sophisticated and more extensive in scope, and poses a serious threat to the Vietnamese economy as well as to Vietnamese society. During the 1990s, the “*Tamexco*” (1996)<sup>95</sup> and “*Tang Minh Phung*” (1997) cases,<sup>96</sup> which both involved several senior public officials and caused considerable economic losses, exposed large-scale corruption scandals. In the 2000s,

<sup>92</sup> Kay Johnson (2003), “Goodbye, Godfather”, available at: <http://www.time.com/time/magazine/article/0,9171,428126,00.html> (accessed 5 May 2013).

<sup>93</sup> Transparency International (2013), “*Corruption Index 2013*” available at: <http://cpi.transparency.org/cpi2013/results/> (accessed 05 April 2014).

<sup>94</sup> A comprehensive survey about corruption in Vietnam is presented in WB, *Corruption from the Perspective of Citizens, Firms, and Public Officials : Results of Sociological Survey* (The National Political Publishing House, 2013). See more in Martin Gainsborough, Dang Ngoc Dinh and Tran Thanh Huong (eds) *Corruption, Public Administration Reform and Development: Challenges and Opportunities as Vietnam Moves towards Middle-income Status* (The National Political Publishing House, Hanoi, Vietnam, 2009) at 279; and Le Van Lan (2012), “Tham Nhung o Viet Nam Vua Tinh Vi Vua Trang Tron’ [Corruption in Vietnam: Blatant and Subtle]”, available at: <http://vnexpress.net/gl/phap-luat/2012/09/tham-nhung-o-viet-nam-vua-tinh-vi-vua-trang-tron/> (accessed 22 May 2013).

<sup>95</sup> Martin Gainsborough, “Corruption and the Politics of Economic Decentralisation in Vietnam” (2003) 33(1) *Journal of Contemporary Asia* 69 at 74-80.

<sup>96</sup> John Gillespie, “Self-Interest and Ideology: Bureaucratic Corruption in Vietnam” (2001) 3(1) *Australian Journal of Asian Law* 1 at 13 - 21.

however, the “*Vinapco*” (2004), “*PMU 18*” (2006),<sup>97</sup> “*PCI*” (2008),<sup>98</sup> and “*Southern Services Flight Company, Petro Vietnam Gas Company, Vietsovpetro Joint Venture, and T & T Co. Ltd. / Nexus Technologies*” (2010) cases,<sup>99</sup> were of much greater extent involving huge amounts of money and sophisticated methods of bribery.

It is evident that the proceeds of corruption are often disguised and laundered by corrupt officials to be able to spend or invest such proceeds.<sup>100</sup> Corrupt officials launder the proceeds of corruption by various typologies.<sup>101</sup> With the massive scale of corruption in Vietnam, there is no doubt that money laundering related to the proceeds of corruption is becoming increasingly serious.

### Case 3

In May 2008, the Hanoi People’s Court presided over the first hearing of the “*Vinapco*” case. It related to a massive fraud and corruption scandal in the state-owned *Viet Nam Air Petrol Company (Vinapco)* from 1996 to 2003.<sup>102</sup> Because of the complexity of the case, which requires further investigation and cross-examination of hundreds of witnesses, the final judgement of this case has not yet been handed down. According to the police investigation, prosecutor’s indictment and a preliminary report released by the State Inspector, however, Vinapco lost VND243 billion (about US\$15.4 million) in fuel trading between 1999 and 2003.<sup>103</sup> It is unprecedented for so many top officials to be alleged to be complicit in a scam

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<sup>97</sup> Stolen Asset Recovery Initiative (StAR) (2010), “All Corruption Cases - Case Control Number: 60 (Bui Tien Dung)”, available at: <http://star.worldbank.org/corruption-cases/node/18638> (accessed 02 April 2013).

<sup>98</sup> Yasunobu Sato, “How to Deal with Corruption in Transitional and Developing Economies: A Vietnamese Case Study” (2009) 16(3) *Journal of Financial Crime* 220 at 222 - 223.

<sup>99</sup> See Stolen Asset Recovery Initiative (StAR) (2010), “All Corruption Cases - Case Control Number: 77”, available at: <http://star.worldbank.org/corruption-cases/node/18655> (accessed 01 April 2013); and US Department of Justice (2010), “Former Nexus Technologies Inc. Employees and Partner Sentenced for Roles in Foreign Bribery Scheme Involving Vietnamese Officials”, available at: <http://www.justice.gov/opa/pr/2010/September/10-crm-1032.html> (accessed 22 May 2013).

<sup>100</sup> WB (2007), “*Strengthening World Bank Group Engagement on Governance and Anticorruption*” at 66, available at: <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/GACStrategyPaper.pdf> (accessed 22 May 2013).

<sup>101</sup> FATF (2011), “*Laundering the Proceeds of Corruption*” at 16 - 24, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf> (accessed 21 April 2013).

<sup>102</sup> My Linh (2008) “Vu Tham o Tai Cong Ty Xang Dau Hang Khong: 14 Bi Cao Hau Toa [Corruption in the Air Petrol Company: 14 Defendants at the Court]”, *An Ninh Thu Do*, 15 May 2008, available at: <http://www.anninhthudo.vn/An-ninh-doi-song/Vu-tham-o-tai-Cong-ty-Xang-dau-hang-khong-14-bi-caohau-toa/324817.antd> (accessed 22 May 2013).

<sup>103</sup> AFP (2004) “Two more arrested over Vietnam Airlines fuel scam”, *Agence France Presse* November 2004, available at: <http://patrick.guenin2.free.fr/cantho/vnnews/twomore.htm> (accessed 22 May 2013).

to embezzle millions of US\$ of public funds. It is noteworthy that the defendants are alleged to have conspired to establish their own joint stock company (Nam Vinh Joint Stock Company) as a front company in order to launder their illicit money derived from corruption.<sup>104</sup>

*Crimes committed by people of Vietnamese origin abroad*

A large number of Vietnamese people live, work and study overseas.<sup>105</sup> They have contributed substantially to the economy of Vietnam.<sup>106</sup> However, a part of the Vietnamese community living abroad has engaged in criminal networks, including drug trafficking, human trafficking and money laundering.<sup>107</sup> In Canada and the UK, recent raids on illicit cannabis cultivation have revealed the growing dominance of suspects of Vietnamese origin.<sup>108</sup> It is believed that the Vietnamese criminals involved in the illegal cannabis cultivation have earned immense profits, and a vast proportion of these profits has been remitted back to Vietnam.<sup>109</sup> Only a limited amount of the illegal money is transferred from the UK to Vietnam through the banking system. The preferred mechanism for remittance of the illegal funds is the use of ARSs, for example through small businesses in the UK and their

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<sup>104</sup> SGGP (2005), “Phat Hien Rua Tien Trong Vu An Tai Cong Ty Xang Dau Hang Khong [Revealing Money Laundering in the Case of *Air Petrol Company*]”, available at: <http://tuoitre.vn/Kinh-te/80911/Phat-hien-rua-tien-trong-vu-an-tai-cty-xang-dau-HK.html> (accessed 3 May 2013).

<sup>105</sup> By 2012, there were about 4.5 million Vietnamese living overseas (see Bich Huyen (2012) “Xay Dung Cong Dong Nguoi Viet o Nuoc Ngoai Vung Manh [Towards the Strong Vietnamese Community Living Overseas]”, *Dai Tieng Noi Viet Nam (The Voice of Vietnam)*, 28 September 2012, available at: <http://vov.vn/Nguoi-Viet/Kieu-bao/Xay-dung-cong-dong-nguoi-Viet-o-nuoc-ngoai-vung-manh/226609.vov> (accessed 23 May 2013)). They are people who have been living abroad prior to 1975 (mainly in Cambodia, China, Laos, France and Canada), who escaped from Vietnam after the fall of Saigon in 1975 as refugees and their descendants (mainly arriving in North America, Western Europe and Australia), and Vietnamese who went abroad to work or study since the 1990s and then stay permanently overseas.

<sup>106</sup> Recently, Vietnam has consistently been among the world’s top recipients of remittances. In 2010, Vietnam was the world’s tenth biggest recipient of officially recorded remittances among developing countries with about US\$7.2 billion (see WB (2011), “Migration and Remittances Factbook”, available at: <http://siteresources.worldbank.org/INTLAC/Resources/Factbook2011-Ebook.pdf> (accessed 28 April 2013)).

<sup>107</sup> For example, in the Czech Republic, a number of Vietnamese people committed a wide range of crimes, such as economic crime, smuggling of people, violent crime, trafficking in weapons and drugs, and counterfeiting. See Miroslav Nožina, “Crime networks in Vietnamese diasporas. The Czech Republic case” (2010) 53(3) *Crime, Law and Social Change* 229 at 252-253.

<sup>108</sup> See Yvon Dandurand and Vivienne Chin, “Strategic Approaches to the Control and Prosecution of *Marihuana Growing and Trafficking Offences*” at 18-19, available at: [http://www.icclr.law.ubc.ca/publications/reports/marihuana\\_strategies\\_yd1.pdf](http://www.icclr.law.ubc.ca/publications/reports/marihuana_strategies_yd1.pdf) (accessed 23 May 2013); and Daniel Silverstone and Stephen Savage, “Farmers, factories and funds: organised crime and illicit drugs cultivation within the British Vietnamese community” (2010) 11(1) *Global Crime* 16 at 17.

<sup>109</sup> See Daniel Silverstone, “The Policing of Vietnamese Organized Crime within the UK” (2011) 5(1) *Policing: A Journal of Policy and Practice* 41 at 41; and Silverstone and Savage, above n108, at 30-31.

counterparts in Vietnam.<sup>110</sup> Some Vietnamese students studying in the UK were also found to be involved in money laundering through ARSs.<sup>111</sup> In Canada, there is also a thriving underground remittance system for transferring money from Canada to Vietnam, which may be used for money laundering.<sup>112</sup>

#### *Case 4*

In March 2004, more than 130 defendants across the US and Canada were arrested as part of a three-year investigation, called “Operation Candy Box”, that targeted an international criminal organization involved in drug trafficking and money laundering.<sup>113</sup> According to the outcome of collaborative investigation among several American and Canadian law enforcement agencies, the organization was controlled by Ze Wei Wong, a Chinese national, and Mai Phuong Le, a Vietnamese immigrant holding Canadian citizen. Ze Wei Wong was alleged to be the leader of a drug distribution ring operating in 18 US cities and Canada, while Le was accused of directing a sophisticated money laundering operation through money remitters and travel agencies in both the US and Canada. It was proved that up to a million Ecstasy tablets were delivered per month and as much as US\$ 5 million of illicit proceeds was transferred out of North America (including to Vietnam) per month over five years.

In 2009 and 2011, at Dong’s trial in the US,<sup>114</sup> the evidence demonstrated that Dong (a US citizen living in the US) and Mai Le (a Canadian citizen living in Canada) conspired to launder money generated from drug trafficking through the US Tours and Remittance (US Tours) founded by Dong which did business as both a travel agency and a money remittance service to Vietnam. The funds in US Tours’ bank account were transferred a few times a week to the account of a business in Vietnam run by Dong’s brother. Dong was found guilty of money laundering, conspiracy to commit money laundering, and conspiracy to defraud the US by failing to file currency transaction reports.

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<sup>110</sup> Silverstone and Savage, above n108, at 30-31.

<sup>111</sup> Ibid.

<sup>112</sup> Raúl Hernández-Coss (2005), *"The Canada-Vietnam Remittance Corridor: Lessons on Shifting from Informal to Formal Transfer Systems"* at 42-43, available at: [http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/Canada-Vietnam\\_Remittance\\_Corridor\\_WP.pdf](http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/Canada-Vietnam_Remittance_Corridor_WP.pdf) (accessed 23 May 2013).

<sup>113</sup> US Department of Justice (2004), “More Than 130 Arrested in International Narcotics and Money Laundering Investigation”, available at: [http://www.justice.gov/opa/pr/2004/March/04\\_crm\\_209.htm](http://www.justice.gov/opa/pr/2004/March/04_crm_209.htm) (accessed 4 May 2013).

<sup>114</sup> *U.S. v. Dong Dang Huynh*, 420 Fed.Appx. 309 (5th Cir. 2011).

It is worth noting that in January 2004, Mai Le and representatives of Viet-Can Resort & Plantation Incorporation (Canada) travelled to Khanh Hoa province and Ho Chi Minh City (Vietnam) to seek “investment projects” and business partners.<sup>115</sup> At a meeting and discussion with leaders of Khanh Hoa province, she and her company were recommended as a successful Vietnamese business company in Canada which wanted to invest at least US\$25 million in a real estate project (building resort and rented-apartments) in Khanh Hoa. In February, one month after arriving in Vietnam, the project that would enable her to launder millions of US\$ was promptly approved by the Khanh Hoa People’s Provincial Committee. Unfortunately for her, with the cooperation of Vietnamese Interpol, she was arrested in Canada before she could carry out this project.

### **2.3.2      *Typologies of Money Laundering in Vietnam***

The cases described above show that the criminal proceeds have been laundered in Vietnam through the purchases of real estate or luxurious commodities, through ARSs, the banking sector, as well as through investment in forms of legitimate business. In practice, criminal funds can be laundered in Vietnam through other mechanisms and methods. The economic background of Vietnam, as highlighted below, may offer excellent potential for money laundering, such as through currency smuggling, foreign investment, and the securities or insurance markets.

#### *Cash-based economy*

By the end of 2012, with a population of about 86 million people, there were still only around 70,000 Point-of-Sale (POS) devices and 12,000 ATMs, mainly installed in big cities; roughly 20% of the Vietnamese population had a bank account; and non-cash payment accounted for an estimated 14% of the total value of payment.<sup>116</sup> Moreover, many people still maintain the habit of using cash for payment due to fear of banking frauds and banking transactions delays, or to avoid the seizure of taxable income. Vietnam’s hyperinflation in the 1980s and currency depreciation in the 1990s encouraged people to store their wealth in

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<sup>115</sup> Pham Thuc (2007), “Rua tien bang du an [Money Laundering through Projects]”, *Sai Gon Giai Phong*, available at: <http://www.sggp.org.vn/SGGP12h/2007/1/81485/> (accessed 3 May 2013).

<sup>116</sup> The 15th Banking Vietnam Conference (2012), “*Post-Show Report*”, available at: <http://www.banking.org.vn/hn2013/> (accessed 20 April 2013).

commodities, gold and foreign currency. Thus, criminals can convert their proceeds in form of cash or gold to other safer forms of property easily in Vietnam.

Furthermore, Vietnam is surrounded by other neighbouring cash-based countries (Cambodia, Laos and China). Cash is easily exchanged and moved through the lengthy Vietnamese border. This facilitates money laundering through currency smuggling.

#### *Foreign direct investment (FDI) and opportunities for money launderers*

The launch of the “Doi Moi” (Renovation) in Vietnam (1986), which abandoned the centralized command economy and encouraged the emergence of a “socialist-oriented market economy”, has moved the Vietnam economy into a transitional phase. Like other transitional countries, Vietnam is in strong need of funds from abroad for economic development. Vietnam’s government has adopted various policies and legislation with the aim of attracting more overseas investment, facilitating business operations, and integrating with the global economy.<sup>117</sup> Since the early 1990s, Vietnam has witnessed an extraordinary wave of FDI.<sup>118</sup> Nonetheless, the AML legal framework has only been developed recently and is insufficient to prevent and detect illegal funds transferred from overseas through the channel of FDI.<sup>119</sup> This circumstance, undoubtedly, has offered great potential to money launderers. *Case 4* is an obvious example, in which Mai Le took advantage of the foreign investment channel for money laundering.

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<sup>117</sup> To facilitate FDI inflows, Vietnam promulgated the Law on Foreign Investment in 1987, which then subsequently were revised in 1990, 1992, 1996 and 2000 aiming at making the investment environment more attractive. Vietnam has signed numerous bilateral and multilateral trade agreements to promote trade and FDI. See more information about Vietnam’s policies and laws regulating foreign investment in Vo Tri Thanh and Nguyen Anh Duong, “Revisiting Exports and Foreign Direct Investment in Vietnam” (2011) 6(1) Asian Economic Policy Review 112 at 113-115.

<sup>118</sup> From 1994 to 1997, FDI inflows rose to an average of around 9% of the GDP, the highest level among developing and transitional economies in this period (see Nguyen Nhu Binh and Jonathan Haughton, “Trade Liberalization and Foreign Direct Investment in Vietnam” (2002) 19(3) ASEAN Economic Bulletin 302 at 306-307; and Rhys Jenkins, “Globalization, FDI and Employment in Viet Nam” (2006) 15(1) Transnational Corporations 115 at 122-123). In the following years, although there was a lower growth rate of FDI, Vietnam remained an attractive destination country (see Sajid Anwar and Lan Phi Nguyen, “Foreign direct investment and economic growth in Vietnam” (2010) 16(1-2) Asia Pacific Business Review 183 at 183-184). By February 2013, 25 years after the enactment of the Law on Foreign Investment, approximately US\$100 billion FDI capital was disbursed (see Anh Minh (2013) “FDI vào Việt Nam: 25 năm và 100 tỷ [FDI Inflows into Vietnam: 25 Years and US\$100 billion]”, *VnEconomy*, 27 March 2013, available at: <http://vneconomy.vn/20130327024814414P0C9920/fdi-vao-viet-nam-25-nam-va-100-ty.htm> (accessed 23 May 2013)).

<sup>119</sup> Details of the legal inadequacies, for example with regards to customer due diligence, will be discussed in chapter 9.



*Fast- growing but infant real estate, securities and insurance market*

Vietnam's real estate market is a young but fast-growing and vibrant market. After Vietnam's accession to the WTO (in 2007), the market has been promoted by a number of factors, such as supportive governmental policies, a great demand for high quality offices, hotels and apartments, and massive inflows of foreign and domestic capital into real estate projects. The market experienced a boom during 2007 and the first half of 2008, with prices rocketing to as much as 200% of the level before 2007. Real estate has become the most attractive market for both foreign and domestic investors.<sup>120</sup>

There has been a rapid growth of stock markets and the large-scale privatisation of public enterprises in Vietnam.<sup>121</sup> Vietnam has two stock exchanges: the Ho Chi Minh Stock Exchange (HOSE) established in 2000 and the Hanoi Stock Exchange (HNX) opened in 2006. In the period from 2000 to 2004, the securities market was in a nascent stage, with the total capitalization of the listed companies less than 1% of the nation's GDP. From 2005 to 2007, the market soared and peaked in 2007, with the total capitalization equivalent to about 30% of the GDP. Since 2008, due to Vietnam's economic downturn, the market has suffered from various fluctuations, sometimes decreasing sharply. In early 2009, it dropped by about 80% from its peak in 2007. In addition, there are joint stock public companies which are not listed on any of the stock exchanges. Shares of these unlisted public companies are eligible for trading on the Over-the-Counter (OTC) market. Buying OTC securities is similar to investing in a private company and is perceived as "private equity" investing. Normally, the investors, especially foreign investors, negotiate and trade OTC via brokers. Brokers can facilitate the OTC trading process and hide the identities of the investors.

Vietnam's insurance market has also experienced a sharp development since 2007. The Association of Vietnamese Insurers (AVI) estimates that total insurance revenue reached US\$1.78 billion in 2011, a 21.6% increase compared with 2010.<sup>122</sup>

The development of these markets has promoted Vietnam's economy. Nevertheless, these markets, which are in their infancy and lack sufficient AML measures, can provide a fertile

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<sup>120</sup> In 2012, FDI in real estate projects alone, with a capitalization of around US\$49.8 billion, accounted for 23.32% of Vietnam's total FDI (see VOV, "Foreign investment pours into real estate market", available at: <http://english.vov.vn/Economy/Market/Foreign-investment-pours-into-real-estate-market/253705.vov>).

<sup>121</sup> Vinh Nguyen, Anh Tran and Richard Zeckhauser (2012), *"Insider Trading and Stock Splits"*, at 7-8 (Working Paper).

<sup>122</sup> A.M. Best Company (2012), *"Vietnam Market Review"*, at 1.

ground for money laundering.<sup>123</sup> In fact, it does not seem to be difficult to launder criminal funds through these markets,<sup>124</sup> something that Vietnamese authorities have realized.<sup>125</sup>

To summarize, in spite of the absence of concrete statistics about money laundering volumes and money laundering convictions, the extent of the selected predicate crimes and the cases reveal that money laundering has undoubtedly been occurring in Vietnam through various methods. Additionally, money laundering is expected to increase in Vietnam due to many facilitators, such as the cash-based dominant economy, FDI inflows, and the vibrant real estate and stock market with weak AML measures. In other words, Vietnam is vulnerable to money laundering because of its cash-based economy and weak enforcement of AML regulations in numerous sectors of the economy. Furthermore, these factors will challenge the implementation of many anti-money laundering standards.<sup>126</sup>

## 2.4 Conclusion

Although the practice of money laundering is as old as the practice of crime that produces proceeds, it has only been identified comprehensively as a complex illegal phenomenon recently. The given definitions of money laundering may vary in their wording. Despite that, in its essence, money laundering aims at concealing the criminal sources of funds derived from criminal activities, and acquiring a legitimate appearance for those funds. In the modern world, money laundering is closely linked to a wide range of predicate offences that normally generate huge proceeds needing laundering.

By exploiting the technological revolution and a variety of available financial services, the mechanisms and typologies of money laundering have been developed towards variable and more complicated models in order to avoid detection. Cyber money laundering is a new trend. In addition, money laundering tends to be transnational and professionalized.

Money laundering causes both the economic and social harms that justify the formulation and development of international AMLs, including the criminalization of money laundering.

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<sup>123</sup> The recent adopted AML legal frameworks for these markets will be examined in chapter 9.

<sup>124</sup> At present, Vietnamese people can use cash to buy real estate, securities and insurance at any price without any inquiries about the origin of money from the AML authorities.

<sup>125</sup> Nguyen Hien (2012) "Chung Khoan va Bat Dong San Tiep Tay Cho Rua Tien o Viet Nam [Securities and Real Estate Facilitate Money Laundering in Vietnam]", *Dan Tri*, available at: <http://dantri.com.vn/kinh-doanh/chung-khoan-va-bat-dong-san-tiep-tay-cho-rua-tien-o-viet-nam-598716.htm> (accessed 23 May 2013).

<sup>126</sup> Chapter 9 will discuss this in detail.

Money laundering is an existing phenomenon in Vietnam which poses a real threat and can cause harms to Vietnam's economy and many social aspects of Vietnam. A number of factors have made Vietnam very vulnerable to money laundering, especially to transnational money laundering. Having a transitional and fragile economy, Vietnam and its financial sector should be vigilant about money laundering. Furthermore, the establishment of a comprehensive AML legal framework is necessary. Why and how Vietnam has developed its AML legal framework will be scrutinized in the following chapters.

## Chapter 3

### INTERNATIONAL ANTI-MONEY LAUNDERING STANDARDS: DEVELOPMENT, DIFFUSION AND VIETNAM'S CHOICE

#### 3.1 Introduction

#### 3.2 The Development of International AML Standards

##### *3.2.1 The Emergence of International AML Standards in the 1980s*

##### *3.2.2 The Evolution of International AML Standards since the 1990s*

#### 3.3 The Diffusion of International AML Standards

##### *3.3.1 Diffusion by Coercion*

##### *3.3.2 Diffusion by State Socialization*

#### 3.4 Vietnam's Responses to the Diffusion of International AML Standards

##### *3.4.1 Vietnam under External Coercion*

##### *3.4.2 Vietnam and State Socialization of the AML Standards*

#### 3.5 General Contextual Factors in Vietnam Influencing the Implementation of AML Standards

##### *3.5.1 Political Willingness*

##### *3.5.2 The Legal System*

##### *3.5.3 The Intergration of International Treaties into Domestic Laws*

##### *3.5.4 Institutional Structure in AML*

#### 3.6 Conclusion

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### 3.1 Introduction

As noted in chapter 1, the international anti-money laundering standards (AMLSs) have been developed and diffused rapidly in the last two decades. States have been encouraged and/or pressured to implement these standards, especially after 9/11 when terrorist financing came to be believed to be closely linked to money laundering.<sup>1</sup>

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<sup>1</sup> The UN Security Council “*strongly urges* all Member States to implement the comprehensive, international standards embodied in the Financial Action Task Force’s (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing”. See *Resolution 1617 (2005)*, adopted on 29 July 2005, S/RES/1617 (2005), section 7.

This chapter will first examine the development of the AMLSs. It will describe how these standards are aimed at combating money laundering and contributing to the suppression of various predicate offences with the focus on drug offences, corruption, organized crime and terrorist financing. The thesis will argue that the AMLSs have been rationally developed to serve these purposes.

The chapter will then discuss how the AMLSs have been diffused and why States should implement and comply with the AMLSs. In particular, the chapter will look at how Vietnam is being pressured to implement the AMLSs and what are the incentives for Vietnam to do so. It will argue that for political and economic reasons, Vietnam does not have much choice but to implement and comply with the international AML requirements. It will imply that the main source of pressure is the FATF; and that according to the FATF's approach to the assessment of compliance (mentioned in chapter 1), compliance with the international AMLSs requires Vietnam to enact laws and establishment enforcement means compliant with the FATF Recommendations and to ensure the rest of the international institutional AML framework is in place.<sup>2</sup>

The last section of the chapter will set out the general political, legal and institutional context of Vietnam in which the implementation of the AMLSs is carried out. This chapter suggests that external pressure can compel Vietnam to implement adequately the AMLSs, but just in "books"; and it does not ensure the effective implementation in fact because of certain basic contextual factors.<sup>3</sup>

### **3.2 The Development of International AMLSs**

As pointed out in chapter 2 (about trends in money laundering and the harms of money laundering), money laundering across national borders is increasing and is believed to cause trans-boundary harms or risk of such harms. For example, it may harm the integrity of transnational financial institutions and facilitate the rise of transnational crime. Thus, money laundering has become a matter of international concern.

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<sup>2</sup> FATF (2013), *"Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems"* at 12, available at: <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (accessed 29 May 2013). The following chapters will suggest how Vietnam can comply with each category of AMLSs.

<sup>3</sup> The next chapters will discuss specifically how these factors affect the implementation of each category of AMLSs.

The increase in transnational money laundering obviously requires both national and international responses. Money laundering cannot be addressed effectively on a unilateral or bilateral basis.<sup>4</sup> The international AMLSs have been developed to serve as bases for a global response to money laundering. This section examines the historical development of AMLSs. It shows that the AMLSs are derived from various international treaties (“hard law”), resolutions, guidance or recommendations (“soft law”), developed by different international institutions. These institutions formulate specific AMLSs relevant to their expertise (and their jurisdictions) and cross reference each other. The system is highly complex and for reasons of space, only the primary institutions and those related to Vietnam are mentioned in the examination hereafter.

### **3.2.1      *The Emergence of International AML Standards in the 1980s***

The first money laundering countermeasures were set out in US legislation.<sup>5</sup> In the 1970s, the US government and the US lawmakers recognized that money laundering was widespread, and the immense wealth obtained by drug traffickers was being laundered through financial institutions.<sup>6</sup> They believed that money laundering was intimately connected with the increasing use of illegal drugs and with drug trafficking, and that the integrity of the financial system was threatened by launderers.<sup>7</sup> Hence, steps were first taken to control money laundering in the US by the enactment of the Bank Secrecy Act of 1970 (BSA).<sup>8</sup> Furthermore, in the 1980s, the US found that a huge amount of drugs were being trafficked into it. The enormous profits generated from drug trafficking were often transferred out of the country and laundered by sophisticated typologies to avoid seizure by the US

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<sup>4</sup> See more about this argument in Beth Simmons, “International Efforts against Money Laundering” in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) at 246-247.

<sup>5</sup> See more details in Peter Reuter and Edwin M. Truman, *Chasing Dirty Money: The Fight against Money Laundering* (Peterson Institute, 2004) at 50.

<sup>6</sup> Scott Sultzer, “Money Laundering: The Scope of the Problem and Attempts to Combat It” (1995) 63 *Tennessee Law Review* 143 at 145-148.

<sup>7</sup> *Ibid*, at 151-155.

<sup>8</sup> *Currency and Foreign Transactions Reporting Act of 1970*, Pub. L. 91-508, 84 Stat. 114 (1970) (codified at 31 USC. §§ 5311-5314, 5316-5324) [*Bank Secrecy Act of 1970*]. This Act obliges US financial institutions to assist the US government agencies in combating money laundering. The financial institutions are required to keep records of cash purchases of negotiable instruments, to file reports of cash transactions exceeding US\$10,000 (daily aggregate amount), and to report suspicious activities that might be the signs of money laundering, or other criminal activities. The BSA is sometimes referred to as an AML law or jointly as “BSA/AML”. Several AML-related acts have been enacted to amend the BSA. See more in FinCEN, “Bank Secrecy Act”, available at: [http://www.fincen.gov/statutes\\_regs/bsa/](http://www.fincen.gov/statutes_regs/bsa/) (accessed 21 November 2013).

authorities.<sup>9</sup> In response, the US and other States affected by illegal drug-related activities realized that without international cooperation traffickers could avoid the forfeiture of their illicit proceeds simply by removing those proceeds from the jurisdiction in which they were generated.<sup>10</sup> Thus, the US has actively negotiated and signed several bilateral and multilateral treaties to foster international cooperation in the forfeiture of illegal drug trafficking proceeds as well as in fighting drug-related crimes.<sup>11</sup> In addition, in order to protect the integrity of financial institutions and to detect money laundering, the US has also motivated international AML initiatives and encouraged the development of similar AML law models in other countries. It has done so mainly through use of its “soft power”.<sup>12</sup>

One of the early international initiatives in AML was the Statement on Preventing Criminal Use of the Banking System for the Purpose of Money Laundering adopted by the Basel Committee on Banking Regulation in 1988.<sup>13</sup> It is worthy noting that “the US Federal

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<sup>9</sup> Jimmy Gurule, “The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances - A Ten Year Perspective: Is International Cooperation Merely Illusory” (1998) 22(1) *Fordham International Law Journal* 74 at 75.

<sup>10</sup> William J. Snider, “International Cooperation in the Forfeiture of Illegal Drug Proceeds” (1995) 6(3) *Criminal Law Forum* 377 at 378.

<sup>11</sup> *Ibid.*, at 383.

<sup>12</sup> “Soft power”, first identified in the 1990s, is as an emerging resource of power derived from, for example the capacity for effective communication or for developing and using multilateral institutions. The “soft power” of a country is the ability to construct a situation so that other countries develop their interests in ways consistent with its own interests. This power primarily arises from cultural and ideological attraction, political value, foreign policies as well as rules and institutions of international regime (see Joseph S. Nye, “Soft Power” (1990)(80) *Foreign Policy* 153 at 164; and Joseph S. Nye, “Think again: Soft Power” (2006) 1 *Foreign Policy* at 1). In the 1980s, the US economy was seen as the centre of the global economy and had significant influences on other national economies. It had more “soft power” than other States in terms of economic operations and the related fields (see Susan Strange, *States and Markets* (2<sup>nd</sup> ed, Continuum International Publishing Group, 1998)). It is also argued that “international regime tends to reflect the economic and political interests of dominant members of international society”, notably those of the US and European States (see Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press, 2006) at 17-18. For more reference to the US influence on international AML initiatives, see Simmons, above n4, at 248-249.

<sup>13</sup> See Basel Committee on Banking Supervision, “*Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering*” at 3-4, available at: <http://www.bis.org/publ/bcbssc137.pdf> (accessed 22 July 2013). The Basel Committee on Banking Regulation was established in 1974 by the central-bank Governors of the Group of Ten countries made up of eleven industrial countries (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States). The Committee's members come from Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR (Special Administrative Region), India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. It provides a forum for regular cooperation between its member countries on banking supervisory matters with the aim of improving supervisory understanding and the quality of banking supervision worldwide (see Basel Committee on Banking Supervision, “*History of the Basel Committee and its Membership*” (August 2009) at 1, available at: <http://www.bis.org/bcbshistory.pdf> (accessed 21 November 2013)).

Reserve brought the issue of money laundering to the initially unenthusiastic G-10 banking supervisor”.<sup>14</sup> The Statement encouraged banks to know their customers and to cooperate with law enforcement agencies in AML. These requirements have been applied to banks in Vietnam since 2005.<sup>15</sup>

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention)<sup>16</sup>, which was signed by forty-three States, was a major breakthrough in the effort of the US and the United Nations (UN) to urge international cooperation in addressing more effectively many aspects of illicit drug trafficking. Vietnam became a Party to this convention in 1997. What is more relevant to our purposes, however, is that this convention was the first comprehensive international legal instrument imposing a binding obligation on its Parties to criminalize the act of laundering the proceeds of drug-related crimes<sup>17</sup> and to adopt confiscation measures.<sup>18</sup> Many provisions of this convention reflect legal approaches already found in US law.<sup>19</sup> Many provisions of the 1988 Vienna Convention became the cornerstones of the international AMLs.

### 3.2.2 *The Evolution of International AML Standards since the 1990s*

The international AMLs have evolved comprehensively and rapidly since the 1990s with the participation of both public and private actors. What follows is a summary of the major features of these developments illustrating how one development fed into another.

#### *The Financial Action Task Force (FATF)’s Recommendations and Guidance*

The FATF was established by the G-7 meeting in Paris in 1989,<sup>20</sup> with the aim of responding to the increasing problem of drug abuse and the financial power of drug

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<sup>14</sup> See Simmons, above n4, at 249.

<sup>15</sup> See Chinh Phu, “Nghị Định của Chính Phủ về Phòng, Chống Rửa Tiền” [*Government, Government Decree on Prevention and Suppression of Money Laundering*] No. 74/2005/ND-CP (Vietnam), 7 June 2005 [*Government Decree 74/2005/ND-CP*], article 8. These requirements will be examined in chapter 9.

<sup>16</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990.

<sup>17</sup> Ibid, art. 3(b) and (c).

<sup>18</sup> Ibid, art. 5.

<sup>19</sup> David P. Stewart, “Internationalizing the War on Drugs: The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances” (1989) 18 *Denver Journal of International Law and Policy* 387 at 388.

<sup>20</sup> FATF, “History of the FATF”, available at: <http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/> (accessed 27 April 2013).



traffickers.<sup>21</sup> The FATF, an *ad hoc* inter-governmental institution as it has no treaty basis, has an on-going and profound impact on the development of multidimensional AMLs. In 1990, the FATF designed its first set of 40 recommendations on AML which relied heavily on several provisions of the 1988 Vienna Convention.<sup>22</sup> The FATF Recommendations have been updated and revised in 1996,<sup>23</sup> 2003,<sup>24</sup> 2004,<sup>25</sup> and most recently in 2012.<sup>26</sup> The FATF has also set out the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts in its IX Special Recommendations.<sup>27</sup> The 40+9 recommendations have provided the most comprehensive approaches to and frameworks for the national and international AML/CFT (Countering Financing of Terrorism) strategy. Although the recommendations, considered to be “soft law”, are not legally binding, the FATF can suspend member countries which fail to comply with its recommendations, and take countermeasures against non-compliant non-members.<sup>28</sup> The FATF Recommendations consolidate the “hard law” of the treaty obligations and arguably in actual impact are “harder” because of the attachment of sanctions.

Recently, the FATF has worked vigorously with the private sector on the risk-based approach (RBA) to combating money laundering and terrorist financing. This approach aims at identifying the existence of risks, evaluating the risks and developing strategies to manage

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<sup>21</sup> William C. Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (4<sup>th</sup> ed, Council of Europe, 2011) at 91.

<sup>22</sup> FATF (1990), “The Forty Recommendations of the FATF”, available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> (accessed 24 May 2013).

<sup>23</sup> FATF (1996), “The Forty Recommendations”, available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201996.pdf> (accessed 24 May 2013).

<sup>24</sup> FATF (2003), “The Forty Recommendations”, available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf> (accessed 24 May 2013).

<sup>25</sup> FATF (2003, incorporating all subsequent amendments until October 2004), “FATF 40 Recommendations”, available at: <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/the40recommendationspublishedoctober2004.html> (accessed 24 May 2013).

<sup>26</sup> FATF (2012), “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations”, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 22 May 2014).

<sup>27</sup> FATF (2001, incorporating all subsequent amendments until February 2008), “*FATF IX Special Recommendations*” available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf> (accessed 24 May 2013).

<sup>28</sup> How the FATF and its regional bodies work will be discussed in a later part of this chapter.

and mitigate the identified risks in the private sector.<sup>29</sup> Since 2007, the FATF has formulated guidance on implementing the RBA in a number of specific private sectors.<sup>30</sup> This approach will be detailed in chapter 9.

Being a member of the Asia Pacific Group on Money Laundering (APG) since 2007 which is a FATF-style regional body (FSRB), Vietnam has committed to the effective implementation and enforcement of the FATF Recommendations.<sup>31</sup>

#### *The Council of Europe Conventions and European Union (EU) Directives on AML*

The Council of Europe, the European Union and their member States have formulated various regional money laundering countermeasures, and participated actively in and contributed significantly to the evolution of international AMLs.<sup>32</sup>

The Council of Europe has adopted two important conventions on AML which are known as the 1990 Strasbourg Convention<sup>33</sup> and the 2005 Warsaw Convention.<sup>34</sup> In addition, in 1991, the Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering was introduced by the European Council (1991 EU Money Laundering Directive).<sup>35</sup> The major further development in the 1990 Strasbourg Convention and the 1991 EU Money Laundering Directive beyond the 1988 Vienna Convention is that money laundering is no longer exclusively associated with only drug-related crimes. Moving beyond the 1990 FATF Recommendations, the 1991 EU Money Laundering Directive introduced a mandatory reporting obligation to credit and financial institutions, including suspicious transaction reporting.<sup>36</sup> This mandatory reporting obligation was in turn taken up in the

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<sup>29</sup> FATF (2007), "Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures" at 2, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf> (accessed 23 July 2013).

<sup>30</sup> FATF, "Risk Based Approach", available at: <http://www.fatf-gafi.org/documents/riskbasedapproach/> (accessed 19 June 2014).

<sup>31</sup> See APG, "History and Background", available at: <http://www.apgml.org/about/history.aspx> (accessed 17 May 2012).

<sup>32</sup> See Gilmore, above n21, at 173-250.

<sup>33</sup> *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, 8 November 1990, CETS No. 141 (entered into force 1 September 1993) [1990 Strasbourg Convention].

<sup>34</sup> *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* 16 May 2005, CETS No. 198, entered into force 01 May 2008.

<sup>35</sup> *Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering*, 10 June 1991, 91/308/EEC, [1991 EU Money Laundering Directive].

<sup>36</sup> See more in Valsamis Mitsilegas and Bill Gilmore, "The EU legislative Framework against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards" (2007) 56(01) *International and Comparative Law Quarterly* 119 at 120.

revised FATF Recommendations (1996). In turn, again, further developments in the 1996 and 2003 FATF Recommendations were taken up in the second EU Money Laundering Directive which was adopted in December 2001,<sup>37</sup> and in the third Directive which was published in November 2005,<sup>38</sup> while the fourth version was introduced in 2008.<sup>39</sup>

#### *International Criminal Police Organization (INTERPOL) Resolutions*

INTERPOL is one of the most proactive international bodies in AML.<sup>40</sup> INTERPOL has passed several resolutions calling on its member countries to cooperate in AML, such as the resolution on “measures to deal firmly and effectively with the system of illegal international financial transactions: underground and parallel banking” (1991), which was then followed by other resolutions on money laundering legislation, money laundering investigations and international police cooperation in 1997.<sup>41</sup> The police of member countries can communicate with each other through the Interpol Global Communication System and access a comprehensive criminal database system.<sup>42</sup> INTERPOL has examined the major characteristics of money laundering in Asia, and comprehensively analysed alternative remittance systems - the traditional and possibly most popular money laundering method in the Asia Pacific region.<sup>43</sup> This examination has served as a useful reference for law enforcement authorities to respond to money laundering offences committed in the region.

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<sup>37</sup> *Directive of the European Parliament and of the Council amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering*, 4 December 2001, 2001/97/EC, [Directive 2001/97/EC].

<sup>38</sup> *Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, 26 October 2005, 2005/60/EC, [Directive 2005/60/EC].

<sup>39</sup> *Directive of the European Parliament and of the Council amending Directive 2005/60/EC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, 11 March 2008, 2008/20/EC, [Directive 2008/20/EC].

<sup>40</sup> INTERPOL was founded in 1923. As of April 2013, Interpol has 190 members. See INTERPOL, “Structure and Governance”, available at: <http://www.interpol.int/About-INTERPOL/Structure-and-governance> (accessed 24 May 2013).

<sup>41</sup> INTERPOL, “Money Laundering”, available at: <http://www.interpol.int/Crime-areas/Financial-crime/Money-laundering> (accessed 23 July 2013).

<sup>42</sup> INTERPOL, “Data exchange”, available at: <http://www.interpol.int/INTERPOL-expertise/Data-exchange/I-24-7> (accessed 25 May 2013).

<sup>43</sup> Lisa C. Carroll (2005), “Alternative Remittance Systems Distinguishing Sub-systems of Ethnic Money Laundering in INTERPOL Member Countries on the Asian Continent”, available at: <http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/EthnicMoney/default.asp> (accessed 20 June 2011).

The police of Vietnam have actively participated in international and regional police organisations with a high sense of cooperative responsibility. The Vietnamese police became a member of INTERPOL in 1991.

### *The Wolfsberg Group*

The Wolfsberg Group was established in 2000 as an association of eleven global private banks.<sup>44</sup> Many of these banks have their branches in Vietnam. One of its key functions is to work on global AML guidelines for private banking. The Wolfsberg Anti-Money Laundering Principles for Private Banking, which were subsequently published in October 2000, revised in May 2002 and most recently in June 2012, provides the core guidelines on the due diligence requirement for the clients of private banks and the beneficial owners of deposits or other financial transactions.<sup>45</sup>

### *The United Nations Convention against Transnational Organized Crime (Palermo Convention)*<sup>46</sup>

The Palermo Convention represents the attempt of the international community to address transnational organized crime, including money laundering, on a global level. The signatory States made commitments to criminalize the activities committed by organized criminal groups, including laundering of the criminal proceeds of these activities;<sup>47</sup> to adopt money laundering countermeasures;<sup>48</sup> to adopt measures to enable confiscation and seizure of the criminal proceeds of organised crime at both the national and international level;<sup>49</sup> to accelerate and extend the scope of extradition;<sup>50</sup> to strengthen international cooperation in the investigation and prosecution of organized crime;<sup>51</sup> and to develop a series of protocols containing measures to combat specific forms of transnational crime.<sup>52</sup>

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<sup>44</sup> Wolfsberg Group (2013), "Global Banks: Global Standards", available at: <http://www.wolfsberg-principles.com/> (accessed 24 April 2013).

<sup>45</sup> Wolfsberg Group (2012), "*Wolfsberg Anti-Money Laundering Principles for Private Banking*" at 2-3, available at: <http://www.wolfsberg-principles.com/pdf/Wolfsberg-Private-Banking-Principles-May-2012.pdf> (accessed 22 May 2014).

<sup>46</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003.

<sup>47</sup> *Ibid*, article 6.

<sup>48</sup> *Ibid*, article 7.

<sup>49</sup> *Ibid*, articles 12 and 13.

<sup>50</sup> *Ibid*, article 16.

<sup>51</sup> *Ibid*, articles 18, 19, 26 and 27.

<sup>52</sup> Bruce Zagaris, "Trends in International Money Laundering from a US Perspective" (2001) 35 *International Lawyer* 839 at 847.

This convention is believed to be a powerful global weapon to fight transnational organized crime by tackling its lifeblood - the proceeds. The Palermo Convention provides legal tools to allow law enforcement agencies to confiscate criminal assets and crack down on money laundering globally. Vietnam ratified the Palermo Convention in 2012, and is currently carrying out an extensive plan to implement it.<sup>53</sup>

*The United Nations Convention against Corruption (UNCAC)*<sup>54</sup>

The UNCAC is the first binding treaty to provide for a range of anti-corruption measures at the international level. This convention has complemented the international AMLs in several dimensions.<sup>55</sup>

The nexus between corruption and money laundering is obvious, with the presence of one reinforcing the other.<sup>56</sup> As recognized by the World Bank: “corruption proceeds are disguised and laundered by corrupt officials to be able to spend or invest such proceeds. At the same time, corruption in a country's AML institutions (including financial institutions regulators, Financial Intelligence Units (FIUs), police, prosecutors, and courts) can render its AML regime of a country ineffective”.<sup>57</sup> In practice, money launderers can bribe both public officials and private sector employees to facilitate their activities. For instance, employees in banks may be corrupted to support the opening or operating of accounts in a false name, or to ignore requirements to do customer due diligence or report suspicious transactions.

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<sup>53</sup> See Thu Tuong Chinh Phu, “KE HOACH Trien Khai Thuc Hien Cong Uoc Chong toi Pham Co To Chuc Xuyen Quoc Gia va Nghi Dinh Thu ve Phong Ngua, Trung Tri, Tran Ap Toi Buon Ban Nguoi, Dac Biet La Phu Nu va Tre Em ” [*The Prime Minister, Plan on Implementing the Convention on Suppression of Transnational Organized Crimes and Protocols on Prevention & Suppression of Trafficking in Persons, especially Trafficking of Women and Children*], 18 April 2013

<sup>54</sup> *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005.

<sup>55</sup> See more discussion about this point in Indira Carr and Miriam Goldby, “Recovering the Proceeds of Corruption: UNCAC and Anti-Money Laundering Standards” (2011)(2) *Journal of Business Law* at 178-183.

<sup>56</sup> David Chaikin, “Commercial Corruption and Money Laundering: A Preliminary Analysis” (2008) 15(3) *Journal of Financial Crime* 269 at 274.

<sup>57</sup> See WB (2007), “*Strengthening World Bank Group Engagement on Governance and Anticorruption*” at 67, available at: <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/GACStrategyPaper.pdf> (accessed 22 May 2013). In UNCAC, corruption includes the following activities: “Bribery of national public officials”; “Bribery of foreign public officials and officials of public international organizations”; “Embezzlement, misappropriation or other diversion of property by a public official”; “Trading in influence”; “Abuse of functions”; “Illicit enrichment”; “Bribery in the private sector” and “Embezzlement of property in the private sector” (see *UNCAC*, above n4, articles 15-22).

Measures to prevent money laundering are set out in article 14 of the UNCAC. The UNCAC also entails other international AML standards, such as the criminalization of money laundering,<sup>58</sup> freezing, seizure and confiscation of the proceeds of crime.<sup>59</sup> Vietnam ratified the UNCAC in 2009.

*ASEAN's Treaty on Mutual Legal Assistance in Criminal Matters*

Since 1996–1997, the Association of Southeast Asian Nations (ASEAN)<sup>60</sup> has acknowledged the diverse nature of transnational crime beyond drug trafficking and taken note with concern of the expansion of transnational crime into Southeast Asia.<sup>61</sup> The growing problem of transnational crimes, such as terrorism, arms smuggling, money laundering and piracy, has been perceived as a serious threat to State security and regional stability. This threat attracts political attention at the highest diplomatic level. In 2004, the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, signed by like-minded ASEAN Member States including Vietnam, was a crucial step for cooperation among ASEAN nations in response to transnational crime.<sup>62</sup> This is a major regional treaty providing most of the objectives of mutual assistance in prevention, investigation and prosecution of transnational crime including money laundering.

In order to move towards a prosperous and peaceful ASEAN Community in 2015,<sup>63</sup> ASEAN has called for the intensification of cooperation among its members, and of

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<sup>58</sup> UNCAC, above n4, article 23.

<sup>59</sup> Ibid, article 31.

<sup>60</sup> ASEAN was established on 8 August 1967, based on a document signed in Bangkok by five leaders (the Foreign Minister) of five original Member States (Indonesia, Malaysia, Philippines, Singapore and Thailand). Brunei Darussalam joined ASEAN on 8 January 1984; Vietnam on 28 July 1995; Laos and Myanmar on 23 July 1997; and Cambodia on 30 April 1999. See ASEAN, "*The Founding of ASEAN*" at available at: <http://www.asean.org/asean/about-asean/history> (accessed 28 April 2013).

<sup>61</sup> S Pushpanathan, "Combating Transnational Crime in ASEAN" (The 7th ACPF World Conference on Crime Prevention and Criminal Justice, New Delhi, India, 23-26 November 1999) at 1.

<sup>62</sup> ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (2004). This treaty adopted by the Ministers of Justice/Law, Attorneys-General of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Socialist Republic of Vietnam in Kuala Lumpur (Malaysia) in 29 November 2004; and signed by Myanmar and Thailand in 2006. See more information in <http://cil.nus.edu.sg/2004/2004-treaty-on-mutual-legal-assistance-in-criminal-matters-signed-on-29-november-2004-in-kuala-lumpur-malaysia/>.

<sup>63</sup> ASEAN (2009), "*Annual Report 2008-2009: Implementing the Roadmap for an ASEAN Community 2015*" at 1. At the 14th ASEAN Summit (28 February - 1 March 2009), the Heads of State/Government of the ASEAN member States signed the Cha-am/Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015), which consists of: the Blueprints of the ASEAN Political-Security Community (APSC), the ASEAN Economic Community (AEC), the ASEAN Socio-Cultural Community (ASCC), and the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009-2015).

cooperation between ASEAN with extra-regional bodies in the fight against transnational crime. In October 2011, the ASEAN Ministerial Meeting on Transnational Crime (AMMTC), with the involvement of all ASEAN Member States,<sup>64</sup> prioritised the fight against eight types of transnational crime, viz. terrorism, trafficking in persons, drug trafficking, money laundering, sea piracy, arms smuggling, international economic crime and cyber-crime,<sup>65</sup> and noted that money laundering is the backbone of most transnational criminal activities.<sup>66</sup>

In summary, the international AMLSs were initially formulated in the 1980s by the US to combat drug crimes and to protect financial institutions from drug traffickers. Since the 1990s, international organizations and institutions, mainly the UN and in particular the FATF, have largely been in charge of the development of AMLSs. Different institutions have adopted provisions developed by other organizations, and then in turn have their own ideas adopted by other organizations. Western dominance of these organizations is undeniable.

The AMLSs have evolved rapidly beyond their initial purposes. It is rational to argue that the AMLSs now serve as one of the crucial bases for protecting the financial system from criminals and various crimes. This argument provides a solid ground for convincing States to engage in the development, diffusion and implementation of AMLSs.

### 3.3 The Diffusion of International AML Standards

It is clear that an effective regime against money laundering requires the global implementation of international AMLSs.<sup>67</sup> The IMF revealed that money launderers exploit the differences between national AML laws to move their funds easily and are especially attracted to jurisdictions with weak or ineffective AML systems.<sup>68</sup> However, despite the

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<sup>64</sup> AMMTC was established in 1997. The ministers meet once every two years to enhance regional coordination against transnational crime.

<sup>65</sup> ASEAN (2011), "ASEAN Cooperation in Combating Transnational Crime Moving Towards 2015 and Beyond", available at: <http://www.asean.org/news/asean-secretariat-news/item/asean-cooperation-in-combating-transnational-crime-moving-towards-2015-and-beyond> (accessed 17 May 2012).

<sup>66</sup> ASEAN Ministers (2011), "*Joint Statement of the Eighth Asean Ministerial Meeting on Transnational Crime (8th AMMTC)*" at 1, available at: <http://www.asean.org/news/asean-statement-communiques/item/joint-statement-of-the-eighth-asean-ministerial-meeting-on-transnational-crime-8th-ammtc> (accessed 22 April 2013).

<sup>67</sup> Many scholars also support this view, e.g., see Simmons, above n4, at 246-247; and Kenneth S. Blazejewski, "FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks" (2008) 22 Temple International and Comparative Law Journal 1 at 7-8.

<sup>68</sup> See International Monetary Fund (IMF) (2013), "Factsheet: The IMF and the Fight Against Money Laundering and the Financing of Terrorism", available at: <http://www.imf.org/external/np/exr/facts/aml.htm> (accessed 5 March 2014).

sound ground for convincing States of the aims of the AMLSs, it is very challenging to achieve implementation of these standards in all States. Many academics and practitioners have argued that the implementation of AMLSs in developing countries in compliance with international requirements is very expensive, while the benefits are unclear.<sup>69</sup> So, how have the AMLSs been diffused? And why should States implement these standards?

The mechanisms, by which norms and policies are disseminated and shared in a given community or transferred from one party to another, have drawn increasing attention from social science researchers. A number of scholars have discussed the mechanisms of what they variously term: global governance,<sup>70</sup> policy transfer,<sup>71</sup> global diffusion of public policy,<sup>72</sup> norm diffusion in globalization of combating transnational crime,<sup>73</sup> consensus and compliance,<sup>74</sup> and diffusion of international AML policy or regime.<sup>75</sup> In the discussion that follows, the theory of diffusion, an important social science construct conceptualized by a

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<sup>69</sup> See e.g., J.C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell University Press, 2011) at ix. The cost involved is also one of the incentives for States to resist the implementation of the AML standards (see Simmons, above n4, at 248).

<sup>70</sup> See Helge Jörgens, "Governance by Diffusion-Implementing Global Norms through Cross-National Imitation and Learning" in William M. Lafferty (ed) *Governance for Sustainable Development: The Challenge of Adapting Form to Function* (Edward Elgar Publishing Limited, Massachusetts, 2004) at 248-257. Helge Jörgens and other scholars contend that there are three mechanisms of global governance: harmonization, imposition and diffusion. International stimuli generally influence domestic politics through multilateral harmonization, unilateral imposition and cross-national diffusion.

<sup>71</sup> See David Dolowitz and David Marsh, "Who Learns What from Whom: A Review of the Policy Transfer Literature" (2006) 44(2) *Political Studies* 343 at 346-349. The authors argue that there are three forms of policy transfer from one country to another: voluntary transfer, direct coercive transfer and indirect coercive transfer.

<sup>72</sup> Frank Dobbin, Beth Simmons and Geoffrey Garrett, "The Global Diffusion of Public Policies: Social Construction, Coercion, Competition or Learning?" (2007) 33 *Annual Review of Sociology* 449.

<sup>73</sup> See Paulette Lloyd, Beth Simmons and Brandon Stewart, "Combating Transnational Crime: The Role of Learning and Norm Diffusion in the Current Rule of Law Wave" in Michael Zürn, André Nollkaemper, and Randall Peerenboom (eds) *Rule of Law Dynamics: In an Era of International and Transnational Governance* (1st ed, Cambridge University Press, Cambridge, 2012) at 164-170. The authors discuss the global diffusion of norms and policies to address transnational crime, with a focus on human trafficking. They develop two possible mechanisms of normative diffusion: negative externalities and hegemonic pressure.

<sup>74</sup> See Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion* (Routledge, 2012). The authors use the notion of "communicative action" or "argumentative rationality" to explain why States comply with the obligation set out by international law, with a focus on the obligation of combating human trafficking.

<sup>75</sup> In Sharman, above n69, 99-164, the author points out that the international AML standards has diffused through soft tools of governance: blacklisting, ranking, structuring incentives for uncoordinated private actors, socialization and regulatory competition. And in Sebastian Heilmann and Nicole Schulte-Kulmann, "The Limits of Policy Diffusion: Introducing International Norms of Anti-Money Laundering into China's Legal System" (2011) 24(4) *Governance: An International Journal of Policy, Administration, and Institution* 639 at 644 - 650, the authors argue that China has engaged with the international AML regime under diffusion by transnational communication, imposition, legal harmonization and regulatory competition.



number of scholars,<sup>76</sup> is employed to explain the process of dissemination or dispersion of the international AMLSs and the results of that process. It will be argued that AMLSs have been diffused, particularly in developing countries, through two major mechanisms: coercion and State socialization.

### **3.3.1      *Diffusion by Coercion***

Coercion occurs when one State is intentionally forced to implement the regimes, policies and norms favoured by other States, international organizations and private actors through physical force and the manipulation of economic costs or benefits.<sup>77</sup> It can be seen from the foregoing discussions that the development of AMLSs has been driven largely by the US in alliance with some European States in order to minimize potential harms caused by money laundering on their financial systems and economies. These States are active actors in developing the AMLSs,<sup>78</sup> establishing crucial international AML institutions<sup>79</sup> and supporting other States in AML.<sup>80</sup>

Under treaty obligations, the UN urges the Parties to AML-related conventions to implement the embodied AMLSs. International institutions, such as the FATF, the International Monetary Fund (IMF) and the World Bank (WB), encourage and attempt to pressure States, mainly upon economic incentives, to accept and implement the AMLSs.

#### *Treaty obligations*

Since 1988, the UN has called for political effort in combating transnational crime, including the crime of money laundering. A large number of States have become Parties to the UN conventions against transnational crime.<sup>81</sup> States sign and ratify these conventions in order to show their commitment to counter transnational crime. In turn, the conventions

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<sup>76</sup> Zachary Elkins and Beth Simmons, “On waves, Clusters, and Diffusion: A Conceptual Framework” (2005) 598 *Annals of the American Academy of Political and Social Science* 33 at 36-37.

<sup>77</sup> Dobbin, Simmons and Garrett, above n72 at 450.

<sup>78</sup> For example, the risk-based approach was first introduced in the third European Money Laundering Directive (see *Directive 2005/60/EC*, above n38, Preamble, par. 18), then has been developed extensively by the FATF since 2007 (see FATF (2007), above n29).

<sup>79</sup> FATF was established in G-7 meeting with the participation of the US, Canada, Japan and other European States (France, Germany, Italy and the UK).

<sup>80</sup> For example, recently the EU has launched a project supporting the fight against money laundering in West Africa (see EU, “The EU Steps up its Response to fight Money Laundering and Drug Trafficking in West Africa”, available at: [http://europa.eu/rapid/press-release\\_IP-13-230\\_en.htm](http://europa.eu/rapid/press-release_IP-13-230_en.htm) (accessed 1 June 2014)).

<sup>81</sup> The 1988 Vienna Convention, the Palermo Convention and the UNCAC are the primary international conventions against transnational crime.

oblige their State Parties to legislate for new crimes and to cooperate in the suppression of these crimes.<sup>82</sup> The treaty obligations push States to harmonize their domestic criminal laws with the provisions set out in the conventions in order to remove frictions caused by the differences between national criminal laws in inter-state cooperation against transnational crime. Because the violation of treaty obligations often results in serious reputational damage,<sup>83</sup> so most State Parties steadily adjust their AML laws in line with the international provisions by, for example, criminalizing money laundering, expanding the category of predicate offences, and enhancing international cooperation in AML.

#### *FATF's Pressure*<sup>84</sup>

The FATF sets global AML/CFT standards and puts multilateral political pressure on countries, especially developing countries, to secure the full implementation of these standards.<sup>85</sup> Although the FATF frames its Recommendations as legally non-binding standards and uses “should” rather than “shall”, it has established strong mechanisms to ensure compliance from both its members and non-members. The FATF has developed three processes to measure the compliance of countries with its Recommendations:<sup>86</sup> i) annual self-assessment, in which each member provides information about the implementation of specific recommendations for the FATF, then the FATF compiles and analyses the information to evaluate the extent of compliance; ii) periodical mutual evaluation, in which each member’s legislative and regulatory AML standards are subject to an on-site examination by a FATF team and then assessed by the full membership; and iii) the process of publicly identifying “high-risk and non-cooperative jurisdictions” (known as “blacklisting” or “naming and shaming” campaign). The mutual evaluation reports aim to provide an accurate technical assessment of the extent to which the evaluated country has implemented a comprehensive

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<sup>82</sup> Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) at 262.

<sup>83</sup> Beth Simmons, “Treaty Compliance and Violation” (2010) 13 *Annual Review of Political Science* 273 at 277.

<sup>84</sup> See further in the FATF’s pressure for national implementation of the AMLSs in Blazejewski, above n67, at 18-21.

<sup>85</sup> FATF, “*An introduction to the FATF and its work*” at 2, available at: <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/Introduction%20to%20the%20FATF.pdf> (accessed 20 November 2013).

<sup>86</sup> See FATF, “*Financial Action Task Force Mandate (2012-2020)*” (20 April 2012) at 2-3, available at: <http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf> (accessed 25 May 2013); and Sharman, above n69 at 141-142.

AML/CFT system.<sup>87</sup> The reports are published and enforced through the peer pressure mechanism.<sup>88</sup>

The “blacklisting” campaign has been promoted since 2000. In 2000 and 2001, in addition to supervision of its membership, the FATF took the further step of identifying Non-Cooperative Countries and Territories (NCCTs) that had deficiencies in their AML/CFT legal frameworks.<sup>89</sup> In two rounds of reviews, 47 countries and territories were examined based on the 25 NCCT criteria,<sup>90</sup> and 23 of them were listed in a “blacklist” as NCCTs. Between 2000 and 2006, the FATF issued an annual report on the progress in the AML/CFT frameworks of these jurisdictions.<sup>91</sup> All of the 23 jurisdictions subsequently made significant progress in their AML legislation. The launch of process for NCCTs was highly successful in coercing non-FATF members to comply with the FATF recommendations. The last country was removed from the list in October 2006.

Since 2007, the FATF, through the work of the International Co-operation Review Group (ICRG), has analysed and identified high-risk jurisdictions, then proposed specific rectification action.<sup>92</sup> The FATF also provides technical assistance and explicitly encourages non-members to implement its Recommendations. Countries which retain certain strategic AML/CFT deficiencies and have not made sufficient progress in implementing the FATF standards are added to a “blacklist” in the annual FATF’s public statements.<sup>93</sup> In addition, economic sanctions can be imposed against any identified non-cooperative non-members by requiring other countries to apply specific countermeasures on financial institutions of countries concerned with the aim of mitigating risks.<sup>94</sup>

It is a fact that “blacklisting” can damage the reputation of listed countries and their financial intermediaries in the global financial market, and then may cause substantial

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<sup>87</sup> The methodology of the assessment has been updated at FATF, above n2.

<sup>88</sup> FATF (2009), “Memorandum by the Financial Action Task Force (FATF) Secretariat (2009)”, available at: <http://www.publications.parliament.uk/pa/ld200809/ldselect/lddeucom/132/132we08.htm> (accessed 15 October 2012).

<sup>89</sup> FATF (2012), “About the Non-Cooperative Countries and Territories (NCCT) Initiative”, available at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/more/aboutthenon-cooperativecountriesandterritoriesncctinitiative.html> (accessed 12 March 2014).

<sup>90</sup> See these criteria in FATF, “*Report on Non-Cooperative Countries and Territories*” at 1-6, available at: [http://www.fatf-gafi.org/media/fatf/documents/reports/Initial%20Report%20on%20NCCTs%2002\\_2000.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Initial%20Report%20on%20NCCTs%2002_2000.pdf) (accessed 12 March 2014).

<sup>91</sup> See the reports at FATF, above n89.

<sup>92</sup> See FATF (2012), “More about the International Co-operation Review Group (ICRG)”, available at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/more/moreabouttheinternationalco-operationreviewgroupicrg.html> (accessed 12 March 2014).

<sup>93</sup> See the FATF’s public statements at *ibid.*

<sup>94</sup> See FATF, above n26, R19 and INR 19.

economic losses to both government and private sectors.<sup>95</sup> For instance, “blacklisting” may constrict foreign investment, trigger capital flight, and affect the ability to access private financial sectors.<sup>96</sup> Foreign financial institutions may withdraw their business from “blacklisted” States or cut ties with their counterparts in “blacklisted” countries rather than suffer the taint of involvement with “high-risk” partners.<sup>97</sup> Despite being criticized,<sup>98</sup> the “blacklisting” regime has worked effectively. Driven by the threat of being “blacklisted”, a large number of countries have implemented and complied with the AMLs or committed to implementing the AMLs.<sup>99</sup>

#### *Other forms of external coercion*

FATF efforts are supplemented by a number of FATF-style regional bodies (such as APG, the Caribbean Financial Action Task Force<sup>100</sup> and the like) and by other international organizations (e.g., the IMF and the WB).

The FATF - style regional bodies (FSRBs) are established from both FATF members and non-FATF members. The FATF and FSRBs are free-standing organizations. There is no organizational hierarchy between them.<sup>101</sup> A country may be a member of the FATF and member of more than one FSRB.<sup>102</sup> FSRBs interpret and promote the FATF Recommendations that suit their regional characteristics. The FATF-style regional bodies also conduct periodical mutual evaluation or review of every member to assess compliance with the FATF Recommendations. They apply the FATF assessment criteria and approach to their own mutual evaluations on AML systems of the member countries. Normally, the periodic mutual evaluation of FSRB-member countries is conducted mainly by the FSRB or the FATF (sometimes the WB or the IMF) with the joint participation of or consultation with

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<sup>95</sup> Sharman, above n69, at 128.

<sup>96</sup> Ibid, at 128-129.

<sup>97</sup> Ibid.

<sup>98</sup> See, e.g., Todd Doyle, “Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law” (2001) 24 Houston Journal of International Law 279 at 298-308. The author argues that the FATF sanctions may violate international law.

<sup>99</sup> As noted earlier, more than 180 jurisdictions with different backgrounds have joined the FATF or a FATF-style regional body and committed to implementing the similar set of AMLs. See FATF, above n85, at 1.

<sup>100</sup> See CFATF, “CFATF Overview”, available at: [https://www.cfatf-gafic.org/index.php?option=com\\_content&view=article&id=1540&lang=en](https://www.cfatf-gafic.org/index.php?option=com_content&view=article&id=1540&lang=en) (accessed 01 June 2014)

<sup>101</sup> FATF (2012), “*High-Level Principles and Objectives for FATF and FATF-style regional bodies*” at 2, available at: <http://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf> (accessed 23 July 2013).

<sup>102</sup> For example, China is a member of the FATF, the Eurasian Group (EAG) and the APG.

the other bodies. The FATF and FSRBs can provide, by invitation or request, qualified appropriate assessors to participate in each other's mutual evaluation.<sup>103</sup> The APG is the largest FSRB in the region. Based in Australia, it consists of 41 members (as of May 2014) including Vietnam. One of the key functions of the APG is to assess compliance of APG members with the AMLSs through a mutual evaluation programme.<sup>104</sup>

In addition, the FATF has also induced the IMF and the WB to spread the AMLSs.<sup>105</sup> These organizations, of which most countries are members, have devoted increasing attention to AML as its part of their work on financial integrity. They apply similar assessment processes and means used by the FATF in examining the implementation of AMLSs in national financial systems. A high degree of compliance with the international AMLSs may be a condition for the granting of loans and aid to many countries reliant on those organizations.<sup>106</sup> Thus, coercion is combined with incentives for the compliance of these countries.

### 3.3.2 *Diffusion by State Socialization*

State socialization or similar concepts (e.g., transnational channels of communication<sup>107</sup>) appears to be one of the most accepted mechanisms for the international diffusion of norms. Although the concept of State socialization may vary when being applied to different contexts,<sup>108</sup> it usually works in a similar way. To illustrate how the AMLSs are diffused by State socialization, this thesis adheres to the concept of State socialization “as a process of inducting actors into the norms and rules of a given community. Its outcome is sustained compliance based on the internalization of these new norms”.<sup>109</sup> The diffusion of AMLSs

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<sup>103</sup> FATF, above n101.

<sup>104</sup> APG, above n31.

<sup>105</sup> Sharman, above n69, at 140-142.

<sup>106</sup> Ibid.

<sup>107</sup> Jörgens, above n70, at 255; and Heilmann and Schulte-Kulmann, above n75, at 644-646.

<sup>108</sup> Various concepts of socialization are given in Dawson E. Richard and Kenneth Prewitt, *Political Socialization : An Analytic Study* (Little, Brown and Company, 1969); G. John Ikenberry and Charles Kupchan, “Socialization and Hegemonic Power” (1990) 44(03) *International Organization* 283 at 289; Jeffrey T. Checkel, “International Institutions and Socialization in Europe: Introduction and Framework” (2005) 59(04) *International Organization* 801 at 804; and Kai Alderson, “Making Sense of State Socialization” (2001) 27(03) *Review of International Studies* 415 at 417.

<sup>109</sup> Checkel, above n108, at 808-813.

under the mechanism of State socialization has operated mainly through normative persuasion.<sup>110</sup>

Normative persuasion often takes place through dynamic communication in international institutions when agents present arguments and try to convince each other of the rightness of the norms. Then, agents actively and reflectively internalize the new understanding of appropriateness.<sup>111</sup> This process can occur in sites of mutual evaluation, at the plenary meetings of the FATF and the FSRBs, and at conferences, workshop and training sessions.<sup>112</sup>

The procedure of mutual evaluation the FATF and its regional affiliations use can be described as follows.<sup>113</sup> It begins with a questionnaire sent to the country reviewed, which is to be completed and returned to the assessment team. The assessment team, in their on-site visit, carries out interviews with a variety of public officials and private sector representatives about AML policy, legislation and statistics. A draft report, that reflects both the achievement and inadequacies accompanied with specific suggestions, is presented to the host government. The draft report is then discussed in a general session of the plenary meeting. After the discussion, the country in question can get feedback about the extent to which it satisfies the assessment. The country is expected to provide regular progress reports indicating what it has done to fulfil the inadequacies identified. It can be seen that through this procedure, the officials of the host country are engaged in the discussion, meetings and assessment of the AMLs. They can then be persuaded to pass and update their AML laws after each mutual evaluation review.

In addition, transnational learning via other channels facilitates normative persuasion. For example, governmental officials and employees of private sectors are invited and encouraged to participate in AML conferences, seminars and training courses organized by various countries, international organizations or private actors. At these events, the participants can learn and “draw lessons”<sup>114</sup> from experts, their counterparts and other countries. They can

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<sup>110</sup> G. John Ikenberry and Charles Kupchan, “Socialization and Hegemonic Power” (1990) 44(03) *International Organization* 283 at 290 - 292; and Jeffrey T. Checkel, “International Institutions and Socialization in Europe: Introduction and Framework” (2005) 59(04) *International Organization* 801 at 808 - 813. How the FATF persuade countries to implement and comply with the AMLs was also illustrated by Blazejewski, above n67, at 16-18.

<sup>111</sup> Checkel, above n108, at 812.

<sup>112</sup> Sharman, above n69, at 138-150.

<sup>113</sup> *Ibid*, at 141- 142.

<sup>114</sup> In Richard Rose, “What Is Lesson-Drawing?” (1991) 11(1) *Journal of Public Policy* at 6-10, the author considers “lesson-drawing” as a popular means used to transfer an effective “programme” from one State to another.

develop a better understanding about the harms of money laundering, the AMLSs and the need for active implementation and conformity with these standards.

It should be recognized that the boundary of coercion and State socialization is blurred, and they may be mingled. In practice, they complement each other. However, the combination of coercion and incentive may lead to a superficial compliance with international norms, and is insufficient to guarantee a successful legal change at the national level.<sup>115</sup> Society's acceptance of legal norms is an indispensable precondition for the success of national legal change.<sup>116</sup> This precondition cannot be firmly established by external coercion. They must rather be adopted mainly by socialization.<sup>117</sup>

In brief, the rapid diffusion of AMLSs has resulted from the application of both mechanisms. The fear of reputational damage and sanctions and the State socialization pushes countries to implement and comply with the international AMLSs. Nonetheless, to the extent to which a State complies with the AMLSs is a matter of State choice,<sup>118</sup> and depends on how compatible the standards are with national particularities, for instance the political, economic and legal structure.<sup>119</sup> Further, the persuasiveness of the AMLSs and public consensus are decisive factors for the success of national legal change.<sup>120</sup>

### 3.4 Vietnam's Responses to the Diffusion of International AMLSs

The thesis now looks at how Vietnam has been coerced and persuaded to implement and comply with the international AMLSs and asks what choice does Vietnam have? It will point out that under external coercion and State socialization, Vietnam does not have much choice, but rather is compelled to gradually implement and comply with the international AMLSs. This is unlikely to lead to implementation in fact rather than just in "books".

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<sup>115</sup> Michael Kubiciel, "International Legal Development and National Legal Change in the Fight against Corruption" in David K. Linnan (ed) *Legitimacy Legal Development and Change: Law and Modernization Reconsidered* (Ashgate Publishing Limited, Farnham, 2012) at 427.

<sup>116</sup> Ibid.

<sup>117</sup> Kubiciel, above n115.

<sup>118</sup> Peter M. Haas, "Choosing to Comply: Theorizing from International Relations and Comparative Politics" in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) at 64.

<sup>119</sup> Simmons, above n83, at 279.

<sup>120</sup> In Kubiciel, above n115, the author argues that national legal change, especially in criminal law, cannot be enforced. Law must have a connection with the morality and the ethical consensus of a society. The legal transplant is likely to be rejected if it does not take account of national particularities and the society consensus.

### 3.4.1 *Vietnam under External Coercion*

As a State Party to the 1988 Vienna Convention, UNCAC, the Palermo Convention and the 2004 ASEAN Treaty on Mutual Legal Assistance on Criminal Matters, and a member of the APG, Vietnam is legally obliged to adopt numerous international standards against transnational crime, with a focus on drug crimes, corruption, human trafficking and money laundering.<sup>121</sup>

An on-site evaluation of Vietnam by the APG in 2008 revealed substantial inadequacies in Vietnam's AML legal framework.<sup>122</sup> APG's mutual evaluation and the FATF's "blacklisting" of Vietnam in 2011, 2012 and 2013 have intensified the pressure on Vietnam to implement fully the international AMLs.

Furthermore, in order to promote economic expansion, Vietnam has strengthened the relationship with various international financial organizations, including the IMF and the WB. Vietnam's financial institutions are aware that they should meet the international regulatory standards, including AMLs, in order to receive international support and to integrate into the global financial market. For instance, the IMF and the WB have worked closely with the Vietnamese government not only to provide loans and financial aid but also to establish a strong policy and a legal framework in the financial sector.<sup>123</sup> They are among the international organizations which have urged Vietnam to formulate comprehensive AML

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<sup>121</sup> It should be noted that the national regimes against drug crimes, corruption and human trafficking have been initiated earlier than the AML regime. Several drug-related activities have been criminalized since 1999 (Bo Luật Hình Su [*Penal Code*] (Vietnam) Law No. 15/1999/QH10, 21 December 1999, entered into force 1 July 2000, Chapter XVIII), and Luật Phòng, Chống Ma túy [*Law on Prevention and Suppression of Narcotics*] (Vietnam) Law No. 23/2000/QH10, 9 December 2000, entered into force 1 June 2001. Corruption crimes have also been provided for since 1999 (*Penal Code* (Vietnam), chapter XXI, section A). Trafficking in women was criminalized in the 1999 Penal Code (*Penal Code* (Vietnam), Article 119). More information about the national regime against drug crimes and human trafficking can be found in Hoa Phuong Thi Nguyen, "Legislative Implementation by Vietnam of its Obligations under the United Nations Drug Control Conventions" (Doctoral Thesis, University of Wollongong, 2008), and Kneebone and Debeljak, above n74, at 150-155.

<sup>122</sup> See APG (2009), "VIETNAM ME1 (Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism)", available at: <http://www.apgml.org/documents/docs/17/Vietnam%20ME1.pdf> (accessed 20 April 2013), and FATF (2012), "High-risk and Non-Cooperative Jurisdictions", available at: [www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/](http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/) (accessed 2 January 2014).

<sup>123</sup> WB (2002), "*Banking Sector Review: Vietnam*" at 51-54, available at: <http://siteresources.worldbank.org/INTVIETNAM/Data%20and%20Reference/20210601/Banking-Sector-Review.pdf> (accessed 26 April 2013).



legal instruments.<sup>124</sup> In fact, the lack of competent AML laws may prevent Vietnam from doing business with counterparts in developed countries.<sup>125</sup>

### 3.4.2 *Vietnam and State Socialization of the AML Standards*

Vietnam's government and Vietnam's legal enforcement agencies have been active members at different ASEAN's forums, such as the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) and ASEANPOL meetings. In addition, Vietnam is a member country of the APG. Socialization of the AMLs has occurred through communication at various sites, such as at APG plenary meetings, annual APG Typology Workshops, AMMTC, INTERPOL or ASEANPOL meetings,<sup>126</sup> other conferences and training courses.<sup>127</sup>

It is noteworthy, for example, that from 2007 – 2011, the project “VNMS65 - Strengthening of the Legal and Law Enforcement Institutions in Preventing and Combating Money Laundering in Viet Nam”, funded and managed by the United Nations Office on Drugs and Crime (UNODC Vietnam Country Office) in cooperation with the Vietnamese counterpart agencies, was undertaken.<sup>128</sup> This project significantly strengthened the capacity of Vietnam's law enforcement agencies, prosecutorial agencies and other criminal justice institutions as well as civil society in response to money laundering.<sup>129</sup> The project organized various international study visits to the key countries and regions in the global AML regime, including the UK, the US, Philippines and Hong Kong.<sup>130</sup> Vietnamese officials also participated in regional meetings, such as APG's typologies workshops, APG annual

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<sup>124</sup> Vietnam Chamber of Commerce and Industry (VCCI), “IMF, WB Urge Vietnam to Launch Money Laundering Decree”, available at: [http://vccinews.com/news\\_detail.asp?news\\_id=3727](http://vccinews.com/news_detail.asp?news_id=3727) (accessed 26 April 2013).

<sup>125</sup> In an interview with a Deputy Director of the Anti-Money laundering Department of Vietnam.

<sup>126</sup> The Association of National Police Forces of the ASEAN - ASEANPOL (ASEAN chiefs of police of 10 ASEAN member States) was established in 1981 to facilitate the exchange of criminal information among the ASEAN member States. It is also a forum for exchanging views and updating the latest developments in law enforcement for fighting transnational crime.

<sup>127</sup> UNODC, “UNODC delivers anti-money-laundering training in Viet Nam” available at: <http://www.unodc.org/southeastasiaandpacific/en/2010/05/aml/story.html> (accessed 25 May 2013).

<sup>128</sup> UNODC, “Final Evaluation Report: Project Number VNM/S65” at vi, available at: [http://www.unodc.org/documents/evaluation/ProjEvals-2012/VNMS65\\_FE\\_Report\\_FINAL\\_rev.pdf](http://www.unodc.org/documents/evaluation/ProjEvals-2012/VNMS65_FE_Report_FINAL_rev.pdf) (accessed 27 May 2013).

<sup>129</sup> Ibid, at 16-19. The project conducted financial investigation training courses for investigators, and organized mock trials for training prosecutors and judges.

<sup>130</sup> Ibid. The visits aimed at studying money laundering typologies, the legal and institutional frameworks for AML/CFT, and the techniques in investigating financial crimes.

meetings and regional training courses. Two thousand public officials participated in sixty training courses about AML which were delivered by both international and domestic experts.<sup>131</sup> In addition, several other public officials were invited to participate in different regional and international AML-related workshops and conferences. The participants gained a better understanding of money laundering typologies, the AMLSs and their implementation in some particular developed countries. Lessons drawn from these events are believed to be beneficial to Vietnam's AML system.

To sum up, the fact that Vietnam has gradually implemented the AMLSs suggests the successful culmination of external coercive imposition and State socialization. As a result, Vietnam has been removed from the FATF's "blacklist" since February 2014.<sup>132</sup> Nevertheless, deficiencies in the Vietnamese AML legal framework still exist and Vietnam needs to do much more work to attain a high level of compliance with the AMLSs. The following chapters will reveal these deficiencies in detail and suggest the remedies to the current situation of Vietnam.

### **3.5 General Contextual Factors of Vietnam Influencing the Implementation of AMLSs**

Among various factors affecting the implementation and compliance with international agreements within a country, the internal factors of the country itself are the central ones.<sup>133</sup> The fundamental internal factors include the political institutions, economy, legal system, and administrative capacity.<sup>134</sup> It is argued that "while States may wish to comply, not all are capable. Technical and political factors intervene in the choice to comply".<sup>135</sup> This section

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<sup>131</sup> Thanh Hang, "Tong ket du an tang cuong nang luc chong rua tien tai Viet Nam [Summarizing the project on strengthening the capacity of anti - money laundering in Vietnam]", available at: <http://tiengchuong.vn/Ma-tuy/Tong-ket-Du-an-tang-cuong-nang-luc-chong-rua-tien-tai-Viet-Nam/6825.vgp>.

<sup>132</sup> FATF (2014), "High-Risk and Non-Cooperative Jurisdictions: FATF Public Statement - 14 February 2014", available at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-feb-2014.html> (accessed 16 May 2014)

<sup>133</sup> See Abram Chayes and Antonia Handler Chayes, "On Compliance" (1993) 47(2) *International Organization* 175 at 188-197; and Harold K Jacobson and Edith Brown Weiss, "Strengthening Compliance with International Environmental Accords: Preliminary Observations from Collaborative Project" (1995) 1 *Global Governance* 119 at 124-127. The later project identifies four broad categories of factors that affect the implementation and compliance with an international agreement: i) characteristics of the activity that the agreement deals with; ii) characteristic of the agreement; iii) characteristics of the country which is implementing the agreement; and iv) the international environment.

<sup>134</sup> Apart from these factors, there are many others. See Jacobson and Weiss, above n133, at 126.

<sup>135</sup> See detailed discussion of this view in Haas, above n118, at 46-49.

will briefly examine the political factors (the political willingness in AML), the legal characters and institutional AML structures of Vietnam that have profound influence on the implementation and compliance with the AMLs. It will argue that in Vietnam, one of the determining factors is the political willingness of the Communist Party in fighting money laundering.

### 3.5.1 *Political Willingness*

The Socialist Republic of Vietnam is a highly centralized State. Since the reunification of Vietnam in 1975, the Communist Party of Vietnam (CPV) has held a tight grip on most aspects of economic and political life in Vietnam. Supreme policy-making power resides in the CPV, more particularly, its Politburo and Central Committee. Despite the demise of the Soviet Union and the collapse of the socialist regimes in Central and Eastern Europe, Vietnam insists on retaining its socialist political regime headed exclusively by the Communist Party. The role of the CPV is stipulated, in the Constitution of the Socialist Republic of Vietnam<sup>136</sup> and the Statue of the Vietnamese Communist Party, as the leadership of the State and society.<sup>137</sup>

The process of making, interpreting and adopting crucial policies has to comply strictly with the CPV's initiatives, and is supervised closely by the CPV's bodies. In terms of the fight against crime, the CPV usually, based on the actual and potential crimes in a certain period, updates and issues its directives on preventing and combating crimes.<sup>138</sup> In particular, the CPV has a prerogative to oversee the anti-corruption regime.<sup>139</sup> Hence, political

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<sup>136</sup> Article 4 of Hien Phap Nuoc Cong Hoa Xa Hoi Chu Nghia Viet Nam [*Constitution of Socialist Republic of Vietnam*] (Hanoi) 28 November 2013 states that "the Communist Party of Vietnam, the vanguard of the Vietnamese working class, the faithful representative of the right and interest of the working class, people, and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh's thought, is the force leading the State and society".

<sup>137</sup> Dieu Le Dang Cong San [*Statue of the Vietnamese Communist Party*] (Vietnam) 19 January 2011), article 41(1) stipulates that "[t]he Party leads the State and Mass Organisations by political platform, strategies, policies and directives; by educating ideology, recommending personnel; and by inspecting, monitoring the implementation of these..."

<sup>138</sup> The most recent directive is the Dang Cong San Viet Nam, "Chi Thi Ve Tang Cuong Su Lanh Dao Cua Dang Doi Voi Cong tac Phong, Chong Toi Pham Trong Tinh Hinh Moi" [*The Communist Party of Vietnam, Directive of the Politburo on Strengthening the Party's Leadership for the Prevention and Suppression of Crimes in the New Situation*] No. 48-CT/TW 22 October 2010 [*Directive 48-CT/TW*].

<sup>139</sup> In May 2012, the fifth meeting of the 11<sup>th</sup> Party Central Committee decided to establish the Central Steering Committee on Preventing and Combating Corruption controled by the Politburo. This committee consists of sixteen senior comrades and operates under the control of the Politburo (see Ban Chap Hanh Trung Uong, "Quyet Dinh Thanh Lap Ban Chi Dao Trung Uong ve Phong, Chong Tham Nhung" [*Central Committee of*

willingness is undoubtedly one of the determining factors in the establishment and the implementation of AMLs. The establishment of a National Anti-Money Laundering Steering Committee (2009) chaired by a Deputy Prime Minister, which assists the Prime Minister to instruct, enhance and supervise the coordination of relevant ministerial agencies in AML, has shown a political commitment to the fight against AML.<sup>140</sup> In fact, the government might be persuaded to make the commitment, but it remains to be seen whether the commitment is genuine and whether the country is sufficiently convinced to ensure an effective implementation.

It appears that Vietnam still lacks a genuine political will in regard to AML, which results in a reluctance to implement and adopt AMLs in practice. One of the main reasons for this could be that corruption in Vietnam is massive in both the public and private sector.<sup>141</sup> As noted earlier, corruption and money laundering are related and self-reinforcing phenomena.<sup>142</sup> Corrupt officials certainly do not want to implement and enforce AML countermeasures. Corruption undermines the political willingness to fight money laundering illustrated by the adoption of AML laws. Corruption in AML institutions, for example in institutional financial regulators, policy makers and law enforcement agencies, may hinder the actual implementation and enforcement of AMLs.<sup>143</sup>

### 3.5.2 *The Legal System*

Vietnam's legal system has developed primarily under a process of legal borrowing and adaptation of foreign laws derived from China, France, the former Soviet Union, and recently from some Western countries.<sup>144</sup> Under the expansion of “*Doi moi*” in the last 20 years, Vietnam has undertaken a vigorous process of legal reform in response to the emerging economic, political and social phenomena. Nonetheless, thousands of legal documents,

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*the Communist Party of Vietnam, Decision on the Establishment of Central Steering Committee on the Prevention and Suppression of Corruption*] No. 162-QĐ/TW, 1 January 2013 [*Decision 162-QĐ/TW*]).

<sup>140</sup> Thu Tuong Chinh Phu, “Quyet Dinh Ve Viec Thanh Lap Ban Chi Dao Phong, Chong Rua Tien” [*The Prime Minister, Decision on Establishment of the Steering Committee on Prevention and Suppression of Money Laundering*] No. 470/QĐ-TTg (Vietnam), 13 April 2009.

<sup>141</sup> The problem of corruption in Vietnam was noted in chapter 2.

<sup>142</sup> WB, above n57.

<sup>143</sup> See more in Norman Mugarura, “The Effect of Corruption Factor in Harnessing Global Anti-Money Laundering Regimes” (2010) 13(3) *Journal of Money Laundering Control* 272 at 275-278.

<sup>144</sup> John Gillespie, *Transplanting Commercial Law Reform: Developing a ‘rule of Law’ in Vietnam* (Ashgate Publishing Company 2006) at 39-68.

pragmatically enacted in such a short time, have created a complex and interwoven web of laws which is notorious for its vagueness, disorder and inconsistency.

Similar to other civil law systems, e.g., French civil law,<sup>145</sup> the main source of Vietnam's contemporary laws is written legislation. The hierarchy of legal norms (known as "legal documents") is "*Hien phap*" (constitutional laws), "*luat*" (laws), "*phap lenh*" (ordinances), "*nghe dinh*" (decrees or government regulations) and "*thong tu*" (circulars). The hierarchy of legal documents parallels the administrative hierarchy of issuing bodies in the structure of the political system (see Table 1). *Stare decisis* does not apply in Vietnam. The general principles of the application of laws are: a specific law overrules a general law and a higher legal source overrules a lower one. Normally, while higher ranking legal documents set out more general norms, lower ones provide details or instructions for implementing the higher ones. For example, "*thong tu*" (circulars) provide instructions, issued by relevant ministerial bodies, on how to interpret, apply and enforce new laws.

The disparate pieces of Vietnamese written legislation have an insufficient unity, and cannot be regarded as coherent bodies of codified law like those in France or Germany. Further, the influence of socialist law makes the contemporary Vietnamese legal system distinct from the civil law tradition.<sup>146</sup> In essence, the contemporary Vietnamese legal system, especially criminal law, still exhibits several persistent fundamentals of "socialist legality"<sup>147</sup> which originated from the former Soviet Union, for example, the supremacy of the CPV over the process of making and enforcing laws. Vietnam adopts the unitary State under the Soviet principle of democratic centralism ("*tap trung dan chu*"),<sup>148</sup> in which legislative, executive and judicial functions are not separate. All State power is centralized in one supreme State organ - the unicameral National Assembly, which then delegates power to lower organs.<sup>149</sup> The Government, supported by local People's Committees, performs executive functions but is accountable to the National Assembly.<sup>150</sup> The Supreme People's Court, the local People's Courts, the Military Tribunals and the other tribunals established by law are the judicial organs.<sup>151</sup> The People's Procuracy supervises the obedience to the law, exercises the right of

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<sup>145</sup> See Eva Steiner, *French Law: A Comparative Approach* (1<sup>st</sup> ed, Oxford University Press, 2010) at 3-14.

<sup>146</sup> John Quigley, "Socialist Law and the Civil Law Tradition" (1989) 37 *The American Journal of Comparative Law* 781.

<sup>147</sup> Gillespie, above n144, at 75-77.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Constitution of Socialist Republic of Vietnam*, above n136, article 69.

<sup>150</sup> *Ibid.*, article 94.

<sup>151</sup> *Ibid.*, article 102.

public prosecution and ensures a consistent implementation of laws.<sup>152</sup> Both the Supreme People's Court and the People's Procuracy are also accountable to the National Assembly.<sup>153</sup>

<b>Enacting Body</b>	<b>Type of Legal Document</b>
National Assembly	The Constitution, Laws (including Codes) and Resolutions
Standing Committee of the National Assembly	Ordinances and Resolutions
The Government	Decrees, Regulations and Resolutions
The Prime Minister	Decisions and Directives
Ministerial Bodies	Circulars
Ministers	Decisions

**Table 1:** *The key Types of Vietnamese Legal Documents in Hierarchical Order*<sup>154</sup>

These general characteristics of the Vietnamese legal system show that the Vietnamese legal framework for AML is likely to consist of scattered legal documents provided for by different authorized agencies. In addition, AML-related laws enacted by the National Assembly can be adopted fully only if the relevant sub-laws (e.g., Government Decrees or Circulars) are produced.

### **3.5.3      *The Integration of International Treaties into Domestic Laws***

The status of international treaties in Vietnam's domestic laws is as follows:<sup>155</sup> i) when it comes to regulations on the same matter, if there is a difference between the relevant domestic legal documents and related treaty provisions to which Vietnam is a Party, the treaty provisions shall prevail; ii) the promulgation of national legal documents must ensure that they shall not obstruct the implementation of relevant treaties to which Vietnam is a Party; and iii) the authorized bodies, when deciding ratification (the National Assembly or the

<sup>152</sup> Ibid, article 107.

<sup>153</sup> Ibid, article 70.

<sup>154</sup> See Luật Ban hành văn bản quy phạm pháp luật [*Law on the Promulgation of Legal Documents*] (Vietnam) Law No. 17/2008/QH12, 30 June 2008, entered into force 1 January 2009, article 2.

<sup>155</sup> Luật Ky Ket, Gia nhập và Thực Hiện Điều Ước Quốc Tế [*Law on the Conclusion, Accession to and Implementation of International Treaties*] (Vietnam) Law No. 41/2005/QH11, 14 June 2005, entered into force 1 January 2006, article 6.

State President) or approval (the Government) of a treaty, shall decide the extent of treaty implementation (wholly or partly) based on its compatibility with domestic legislation. These bodies also decide or propose to amend and supplement domestic laws to facilitate the implementation of the treaty. Thus, while at a first glance transformation of the international standards looks strong, in fact the formal ratification of the AML-related treaties does not ensure that adequate implementation and effective enforcement follows, because of the confused structure of the implementing laws and the potentially diluting effect of poor interpretation (or failure to interpret) by authorised bodies.

### 3.5.4 *Institutional Structure in AML*

Under the current structure of the political system, various governmental institutions have responsibility for and authority over AML.<sup>156</sup> The pivotal ones are: the SBV, to which the Anti-Money Laundering Department (AMLD, which functions as a FIU) is affiliated;<sup>157</sup> and the Ministry of Public Security (MPS). Other related ministries, ministerial agencies and local People's Committees are obliged to cooperate with these institutions in combating money laundering.

The SBV acts as the leading agency in cooperation with other relevant agencies against money laundering. It is responsible for reviewing the effectiveness of the AML system in Vietnam and making proposals to the Government for strategic resolutions for AML.<sup>158</sup> The AMLD has the function of receiving, processing and disseminating information concerning money laundering. The AMLD has the right to request concerned agencies to provide information and records of suspicious transactions.

The MPS, to which the police belong, is a powerful law enforcement agency which has an overarching responsibility for combating money laundering.<sup>159</sup> The MPS's main responsibilities for AML are to organize the investigation of money laundering-related crimes and to cooperate with other agencies in conducting the investigations of such crimes.<sup>160</sup> It also works closely with the People's Procuracy and the People's Court in investigating,

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<sup>156</sup> Luat Phong, Chong Rua Tien [*Law on Prevention and Suppression of Money Laundering*] (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013, chapter III.

<sup>157</sup> Chinh Phu, "Nghị Định Quy Định Chức Năng, Nhiệm Vụ, Quyền Hạn và Cơ Cấu Tổ Chức Của Ngân Hàng Nhà Nước Việt Nam" [*Government, Decree on Defining the Functions, Tasks, Authorities and Structure of the State Bank of Vietnam*] No. 156/2013/NĐ-CP (Viet Nam), 11 November 2013, article 2.

<sup>158</sup> *Law on Prevention and Suppression of Money Laundering*, above n156, article 37.

<sup>159</sup> *Ibid.*, article 38.

<sup>160</sup> *Ibid.*

prosecuting and sentencing money laundering-related crimes. The MPS has a complex structure consisting of a number of general departments and departments responsible for various missions. Under the current arrangements, there is no specialized department in charge of investigating money laundering crimes. Most of the departments involved in preventing and combating crimes can undertake the investigation of money laundering crimes. The major ones are: the Department of Economic Crimes Investigation, the Department of Drug Crimes Investigation, the Department of Cyber Crimes Investigation and some other security departments. Unfortunately, these Departments all lack staff skilled in investigating money laundering.<sup>161</sup> The absence of a specialized authority in investigating money laundering may hamper the investigation and prosecution of such crime.

### **3.6 Conclusion**

The international AMLSs have been developed and diffused rapidly in the last two decades. The diffusion of the AMLSs and States' choice of the implementation and compliance with these standards is the outcome of two key mechanisms: coercion (from the powerful economies and international institutions) and State socialization (through tactical communication). Developing countries, like Vietnam, have implemented the international AMLSs under pressure from other States and international organizations rather than on a voluntary basis.<sup>162</sup> Under the mechanisms of coercion and State socialization, Vietnam has gradually transformed the AMLSs into its domestic laws in order to avoid economic sanctions and reputational damages. Although Vietnam has been removed from the FATF's "blacklist", significant deficiencies remain in its AML legal framework. Legal reform needs to be continued to enhance the compliance with the international AMLSs.

Vietnam has its own political, economic and legislative and other internal factors that shape the implementation of the AMLSs. These contextual factors are argued to dilute the implementation in fact of the AMLSs. In addition, proposals for legal changes in the following chapters must take these factors into account.

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<sup>161</sup> A large number of the authorized police and law enforcement staff have not been provided with any formal courses in the investigation and prosecution of money laundering crimes. A small number of them have been trained in short courses sponsored by international organizations (e.g., the United Nations Office on Drugs and Crime (UNODC)) and foreign States.

<sup>162</sup> This argument is also supported by J.C. Sharman, "Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States" (2008) 52(3) *International Studies Quarterly* 635 at 635.



## Chapter 4

### CRIMINALIZATION OF MONEY LAUNDERING

- 4.1 Introduction**
  - 4.2 Predicate Offences**
  - 4.3 International Standards of the Criminalization of Money Laundering and the Differences in National Implementation**
    - 4.3.1 The Actus Reus/Physical Element*
    - 4.3.2 The Mens Rea/Mental Element*
    - 4.3.3 The Liability and Sanctions*
  - 4.4 Interim Conclusion**
  - 4.5 Basic Principles of Vietnamese Criminal Law**
    - 4.5.1 The Sources of Criminal Law*
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    - 4.6.2 The Subjective Aspect (Mens Rea – “Mat Chu Quan”)*
    - 4.6.3 The Object and Subject of Money Laundering Crimes*
    - 4.6.4 The Liability and Sanctions for Money Laundering Crimes**
  - 4.7 Comments and Suggestions for Reform**
  - 4.8 Conclusion**
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#### **4.1 Introduction**

In theory, States criminalize certain conduct by setting out, preferably in advance and in clear terms, a catalogue of specified actions or omissions (the *actus reus*) that are prohibited, accompanied by ranges of sanctions for violation.<sup>1</sup> In general, conduct is deemed to be criminalized when i) it is morally wrongful, and ii) it satisfies a properly defined “Harm

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<sup>1</sup> A P Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing Ltd, 2011) at 3.

Principle” or “Offence Principle”.<sup>2</sup> The specification of prohibition should include appropriate culpability elements (the *mens rea*), high standards of proof and proportionate sanction.<sup>3</sup> The discussion in chapter 2 has revealed that the harms of money laundering clearly justify its criminalization in all States, including Vietnam.

Money laundering was first made a criminal offence in the United States (US) in 1986.<sup>4</sup> The criminalization of money laundering was believed to be the necessary legal basis for US law enforcement agencies to deter, detect and prosecute launderers directly; to forfeit the property involved in money laundering;<sup>5</sup> and to take action against underlying crimes producing criminal proceeds.<sup>6</sup>

Most States have now criminalized money laundering.<sup>7</sup> What is more, the international community is encouraging and/or pushing States to criminalize money laundering in a similar way (i.e. with a similar set of constituent elements) in order to promote international cooperation in preventing, detecting and prosecuting transnational money laundering offences. The global criminalization of money laundering is considered to be a fundamental basis for other aspects of international cooperation in AML, such as mutual legal assistance and extradition for transnational money laundering offences.<sup>8</sup> In response, the international

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<sup>2</sup> In *ibid*, at 92, it is argued that under the Offence Principle, the offensive conduct also involves some form of harm.

<sup>3</sup> *Ibid*, at 3.

<sup>4</sup> The criminalization of a category of activities, known as money laundering, was first provided for in the Money Laundering Control Act of 1986 (MLCA). Section 1352 of the MLCA referred to “New offense for laundering of money instruments”, which was codified at 18 USC § 1956 (“Laundering of monetary instruments”) and § 1957 (“Engaging in monetary transactions in property derived from specified unlawful activity”). See *Money Laundering Control Act of 1986*, Pub L No 99-570, §§ 1351-1367, 1986 (United States), 100 Stat. 3207 (this Act was Subtitle H of *Anti-Drug Abuse Act of 1986*, Pub L No 99-570, 1986 (The United States), 100 Stat. 3207).

<sup>5</sup> Forfeiture of the property involved in money laundering under US law will be illustrated in chapter 6.

<sup>6</sup> As noted in chapter 3, the *Currency and Foreign Transactions Reporting Act of 1970*, Pub L No 91-508, 1970 (The United States), 84 Stat. 1118 (BSA) marked the first action taken by the US against money laundering. However, the US authorities realized that the BSA was insufficient to prevent criminals from laundering the proceeds of their crimes. The law enforcement agencies needed other more powerful legal instruments to prevent, detect and prosecute launderers. As a result, the MLCA was enacted to strengthen the BSA by imposing a more coercive reporting duty on individuals. This Act filled the shortcomings of the BSA by providing, for example, in section 1354 about “Structuring transaction to evade reporting requirements prohibited” (codified at 31 USC § 5324), and section 1358 about “Money transaction reporting amendments” (codified as amended at 31 USC § 5316). See more in Mark R. Irvine and Daniel R. King, “The Money Laundering Control Act of 1986: Tainted Money and the Criminal Defense Lawyer” (1987) 19 *Pacific Law Journal* 171 at 172-173; and *U.S. v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

<sup>7</sup> See the “Comparative Table” in United States Department of State, *“International Narcotics Control Strategy Report (INCSR): Volume II Money Laundering and Financial Crimes”* (March 2014) at 40-50, available at: <http://www.state.gov/documents/organization/222880.pdf> (accessed 10 April 2014).

<sup>8</sup> These issues will be discussed in chapter 7 and 8.

community has set up the international standards regarding the criminalization of money laundering, and required States to implement those standards. This prompts a number of questions: how have different States criminalized money laundering? Particularly, how has Vietnam implemented the criminalization of money laundering? Are the legal adjustments it has made sufficient? And has Vietnam criminalized money laundering in a way that is consistent with its basic criminal law principles or in a way that suggests that it seeks only to please the international community? These questions will be answered in this chapter.

As there is no money laundering offence without predicate offences, so the criminalization of money laundering is associated with the category of predicate offences. The chapter will first examine the classification of predicate offences provided for in international law and national laws. It will then explore the international provisions of the main constituent elements of money laundering offences, and disparities among national criminalization of money laundering. Finally, it will scrutinize how Vietnam, subject to its own fundamental criminal law principles, has criminalized money laundering, and will suggest how Vietnam should remedy the obvious loopholes and weaknesses in its criminalisation.

## **4.2 Predicate offences**

The scope of predicate offences has been extended since money laundering was first criminalized. The 1988 Vienna Convention was the first international convention binding its State Parties to criminalize forms of conduct that are, in essence, money laundering activities (the term “money laundering” or “laundering” was not used). The predicate offences designated in this convention cover solely drug supply-related offences.<sup>9</sup> After that, in 1996, the FATF recommended that each country should extend the scope of predicate offences for money laundering to serious offences, and that each country should determine which serious crimes are to be categorized as predicate offences.<sup>10</sup> However, the 1996 FATF Recommendations did not provide any specific guidance about categories of serious offences. In 2000, the Palermo Convention also required its State Parties to include a range of offences

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<sup>9</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990, article 3(1)(b).

<sup>10</sup> FATF (1996), “The Forty Recommendations”, available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201996.pdf> (accessed 24 May 2013), Recommendation 4 (R4).

associated with organized criminal groups and all serious crimes as predicate offences.<sup>11</sup> The Convention defines a serious offence as an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.<sup>12</sup> In even greater detail and with more flexibility, the 2012 FATF Recommendations encourage countries to apply the predicate offences to all serious offences, or to a threshold linked either to a category of serious offences, or to the penalty of imprisonment, or to a list of predicate offences, or combination of these approaches.<sup>13</sup> The “designated categories of offences” are recommended by the FATF as a minimum range of offences that should be included in the category of predicate offences of each country. They are: participation in an organized criminal group and racketeering, terrorism (including terrorist financing), trafficking human beings and migrant smuggling, illicit trafficking in narcotic drugs and psychotropic substances, corruption and bribery, to name a few.<sup>14</sup>

Furthermore, the scope of predicate offences has been extended beyond the domestic jurisdiction to fulfil the global dimension of the AMLs. The Palermo Convention and the UNCAC stipulate that “predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question”.<sup>15</sup> The FATF also recommends that predicate offences should include offences committed in another country.<sup>16</sup> The US has extended the list of predicate offences to include offences committed abroad, such as, any foreign corruption.<sup>17</sup>

By examining the designation of the categories of predicate offences in different States with different legal systems, we can see that it appears to follow one of four distinct models. The first model encompasses all criminal offences as predicate offences, the so-called “all

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<sup>11</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003, article 6(2)(b).

<sup>12</sup> *Ibid.*, article 2(b).

<sup>13</sup> FATF (2012), “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations”, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 22 May 2014), Interpretive Note to Recommendation 3 (INR 3).

<sup>14</sup> Designated categories of offences are defined and listed by the FATF. See FATF, “*The FATF Recommendations - Glossary*” at 112-113, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 21 July 2013).

<sup>15</sup> *Palermo Convention*, above n11, article 6(2)(c); and *1988 Vienna Convention*, above n9, article 23(2)(c).

<sup>16</sup> See Recommendation (R) 3 of FATF, above n13; and the definition of “designated categories of offences” in FATF, above n14.

<sup>17</sup> 18 USC § 1956(c)(7)(B)(iv).

crimes” approach, adopted, for example, by Russia and the UK.<sup>18</sup> All crimes listed in the Criminal Code of the Russian Federation (2003), with the exception of six trivial crimes, are predicate crimes for money laundering.<sup>19</sup> The second model covers the offences with a threshold of specified certain standards (such as the degree of sanction or the size of proceeds). For example, in Australia, predicate offences are all indictable offences.<sup>20</sup> Under Australian law, an indictable offence is one with a penalty of a minimum of 12 months imprisonment. The third model refers to a specific list of predicate offences, the model used, for instance, in the US.<sup>21</sup> The last one is the mixture of the second and the third model used, for example, in Germany. The predicate offences for money laundering in Germany cover all serious offenses plus a number of specifically listed misdemeanors.<sup>22</sup>

#### **4.3 International Standards of the Criminalization of Money Laundering and the Differences in National Implementation**

The suppression conventions, such as the 1988 Vienna Convention,<sup>23</sup> the Palermo Convention<sup>24</sup> and the UNCAC,<sup>25</sup> and the FATF Recommendations provide international standards for the criminalization of money laundering. It should be noted that these

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<sup>18</sup> See Proceeds of Crimes Act 2002 (the United Kingdom), section 340(2).

<sup>19</sup> Article 174(1) of the Criminal Code of the Russian Criminal Code provides that “[t]he conduct of financial operations and other transactions with monetary assets or other property known to have been acquired by other persons by criminal means (with the exception of the crimes envisioned in Articles 193, 194, 198, 199, 199.1, and 199.2 of this Code), for the purpose of giving a legitimate appearance to the possession, use, and disposition of the stated monetary assets or other property shall be punished by a fine in the amount of up to 120,000 Rubles or in the amount of the salary or other income of the convicted person for a period of up to one year”. See English translation of the Criminal Code of Russian Federation (amended by the end of 2003) in Sarah J. Reynolds, “The “New” Criminal Code of the Russian Federation” (2003) 39(4) *Statutes & Decisions: The Laws of the USSR and Its Successor States* 20 at 35-36.

<sup>20</sup> Criminal Code Act 1995 (consolidated as of 31 October 2012) (Australia), Division 400.1(1)

<sup>21</sup> Predicate offences for money laundering cover the designated federal, state and foreign crimes. Around 250 predicate offences are listed in 18 USC § 1956(c)(7) and include all of the Racketeer Influenced and Corrupt Organization (RICO) predicate offences listed in 18 USC § 1961(1).

<sup>22</sup> Section 261(1) of the German Criminal Code (2009) states that “[w]hosoever hides an object which is a proceed of an unlawful act listed in the 2<sup>nd</sup> sentence below, conceals its origin or obstructs or endangers the investigation of its origin, its being found, its confiscation, its deprivation or its being officially secured shall be liable to imprisonment from three months to five years. Unlawful acts within the meaning of the 1st sentence shall be 1) felonies; 2) misdemeanours under...”. See “German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*)” (2009), available at: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf) (accessed 12 December 2012).

<sup>23</sup> *1988 Vienna Convention*, above n9, article 3(1)(b).

<sup>24</sup> *Palermo Convention*, above n11, article 6.

<sup>25</sup> *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005, article 23.

conventions and recommendations mesh with each other to set up the elements of money laundering offences. This suggests a concerted effort by different international organizations to ensure that they do not produce conflicting obligations to criminalize money laundering. The conventions and the FATF Recommendations call for their States Parties and member countries, subject to their own legal systems, to criminalize money laundering in compliance with the international standards.<sup>26</sup>

Although each State is obliged to criminalize the conduct provided for in the conventions, its criminalization “rests upon an assumption about the legitimate political, social and economic interests, and assertions about the harm caused to these interests by the conduct criminalized”.<sup>27</sup> Furthermore, basic principles of national criminal law will shape the detailed elements of the criminalization, such as the *actus reus*, the *mens rea* and punishment. How the international conventions provide these elements and how States have criminalized money laundering in their own ways is examined hereafter.

#### **4.3.1      *The Actus Reus/Physical Element***

At the international level, the first description of the conduct elements of money laundering offences was spelled out in the 1988 Vienna Convention.<sup>28</sup> The conduct elements of money laundering offences are also set out in identical terms in article 6(1) of the Palermo Convention and in article 23(1) of UNCAC as follows:

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- (ii) The concealment or disguise of the true nature, source, location, disposition movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (b) Subject to the basic concept of its legal system:
  - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime.
  - (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

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<sup>26</sup> See R3 and INR 3 of FATF, above n13.

<sup>27</sup> Neil Boister, ““Transnational Criminal Law?” (2003) 14(5) European Journal of International Law 953 at 957.

<sup>28</sup> 1988 Vienna Convention, above n9, article 3(1)(b).

In general, these conventions call for their States Parties to criminalize the four listed categories of activities in accordance with their domestic law.

*Conversion or transfer of the proceeds of crime for the purpose of concealing or disguising these proceeds*

These acts include instances in which properties are converted from one form to another, for example, by using illegally generated cash to purchase real estate or the sale of illegally acquired real estate; or instances in which the same properties are moved from one person to another, from one jurisdiction to another or from one bank account to another.<sup>29</sup>

There are differences in the ways States have made these acts criminal offences. The UK uses the same wording as the international provisions - “convert” and “transfer” - to criminalize this act in the Proceeds of Crime Act 2002.<sup>30</sup> The US includes these acts in the broad concept of “financial transaction” which may involve the transfer of title to any real property, vehicle, vessel, or aircraft; involve the use of financial institutions; or involve the physical transportation of funds.<sup>31</sup> “Transaction” refers to “a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition”; and, if involving a financial institution, refers to “a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution”.<sup>32</sup> It should be stressed that in order for a transaction to constitute the *actus reus* of the money laundering offence, it must be intended to conceal or disguise the nature, the location, the source, the ownership or the control of criminal proceeds; or to avoid a transaction reporting requirement.<sup>33</sup>

Germany does not explicitly criminalize the “conversion or transfer” of criminal proceeds. Section 261(1) of the German Criminal Code provides the act of “hiding” an object which is derived from a predicate offence.<sup>34</sup> In the Russian Criminal Code, “conversion or transfer” is

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<sup>29</sup> UNODC (2004), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* at 44, available at: [http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf) (accessed 21 April 2013).

<sup>30</sup> POCA, above n18, section 327(1)(c) and (d).

<sup>31</sup> *Money Laundering Control Act of 1986*, above n4, section 1956(c)(4).

<sup>32</sup> Ibid, section 1956(c)(3).

<sup>33</sup> Ibid, section 1956(a)(1)(B). In *US v. Regalado Cuellar*, 128 S. Ct. 1994 (2008), the court’s decision caused a great deal of controversy, since it was based on the mere fact that Mr Cuellar was transporting the money earned from the illegal drug business across border as evidence of money laundering.

<sup>34</sup> German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n22.

covered by the phrase: “accomplishment of financial operations and other deals in monetary funds or other property”.<sup>35</sup> “Financial operation” is defined as an action to set up, change or end civil rights or responsibilities.<sup>36</sup>

*Concealment or disguise of the proceeds of crime*

This type of money laundering acts includes the concealment or disguise of almost any aspect of or information about property.<sup>37</sup> In addition, the terms “concealing or disguising” and “concealment or disguise” should be understood to include preventing the discovery of the illicit origins of property.<sup>38</sup> It is clear that the purposes of “concealment or disguise” and “conversion or transfer” overlap to a certain extent.<sup>39</sup> Both of them may have the effect of concealing and disguising the origins of property. The other purpose of “conversion or transfer” is helping “any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action”. The text uses the term “any person” instead of “any other person”, thus “any person” is apt to include the offender himself.<sup>40</sup> Nevertheless, in many cases, the act of “concealment or disguise” serves both purposes. For example, the criminal origin of the property would be disguised to reduce the possibilities of its confiscation and the offender’s conviction.<sup>41</sup>

Some States, such as the UK and Germany,<sup>42</sup> follow the same language when criminalizing such acts. Others have adopted these money laundering offences with a different wording. The phrase used by Russia, which includes “concealment or disguise”, is “for purpose of giving a legitimate appearance to criminal proceeds”.<sup>43</sup>

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<sup>35</sup> Criminal Code of the Russian Federation (*English translation*) (2003), article 174(1).

<sup>36</sup> FATF, “*Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism: Russian Federation*” at 33, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Russia%20ful.pdf> (accessed 17 March 2014).

<sup>37</sup> UNODC, above n29.

<sup>38</sup> United Nations (2000), “*Interpretative Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*” at par. 11, available at: [http://www.unodc.org/pdf/crime/final\\_instruments/383a1e.pdf](http://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf) (accessed 30 April 2013).

<sup>39</sup> United Nations (1998), “*Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*” at pars. 3.47 and 3.50, available at: [http://www.unodc.org/documents/treaties/organized\\_crime/Drug%20Convention/Commentary\\_on\\_the\\_united\\_nations\\_convention\\_1988\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf) (accessed 28 April 2013).

<sup>40</sup> Ibid, par 3.49.

<sup>41</sup> Ibid.

<sup>42</sup> See POCA, above n18, section 327(1)(a)(b); and German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n22, section 261(1).

<sup>43</sup> Russian Criminal Code, above n35, section 174(1).



*Acquisition, possession or use of the proceeds of crime*

This category of conduct is the mirror image of the acts of “conversion or transfer”. The former is an act of recipients who acquire, possess or use property, while the latter is an act of the providers of property.<sup>44</sup> According to Black’s Law Dictionary, “acquisition” means “the gaining of possession or control over something”,<sup>45</sup> and “possession” means “the fact of having or holding property in one’s power; the exercise of dominion over property”.<sup>46</sup> Acquisition of property refers to the process of obtaining anything by any means, such as purchase or donation.

Noticeably, the suppression conventions provide that the implementation of these acts in each State Party is subject to the basic concept of its legal system.<sup>47</sup> It means that State Parties can criminalize these acts in their own ways adhering to their legal principles. The UK, in article 329 of the Proceeds of Crime Act 2002, uses the same language as the international convention. Article 175 of the Russian Criminal Code makes the “acquisition or sale” of property obtained by criminal means a criminal offence. Article 261(2) of the German Criminal Code states that whoever “procures”, “keeps” or “use” an object derived from a criminal activity shall be liable to imprisonment.

*Participation in, association with or conspiracy to commit, attempt to commit and aiding, abetting, facilitating and counselling the commission of any of the foregoing acts.*

These terms are not defined in any convention. It means that State Parties are given certain flexibility, subject to the basic concepts of their legal systems, to adopt such inchoate offences in a way they consider appropriate to their domestic law. In fact, different national criminal laws may conceptualize inchoate offences differently.<sup>48</sup> For example, the inchoate crime of conspiracy defined by the UK’s criminal law differs from that defined by the German criminal law,<sup>49</sup> and States, like Vietnam, do not criminalize conspiracy.

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<sup>44</sup> UNODC, above n29, 45-46.

<sup>45</sup> Bryan A. Garner (ed) *Black's Law Dictionary* (8<sup>th</sup> ed, Thomson, 2004) at 25.

<sup>46</sup> Ibid, at 1201.

<sup>47</sup> See, e.g., UNCAC, above n25, article 23(1)(b).

<sup>48</sup> See Kevin Heller and Markus Dubber (eds) *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010).

<sup>49</sup> See Andrew Ashworth, *Principles of Criminal Law* (6<sup>th</sup> ed, Oxford University Press, 2009) at 448; and German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n22, section 30.

#### 4.3.2 *The Mens Rea/Mental Element*

Article 3(3) of the 1988 Vienna Convention, article 6(2)(f) of the Palermo Convention and the INR 3 of the 2012 FATF Recommendations have provided the *mens rea* of money laundering offences with two central elements: the intent to commit the conduct elements of money laundering offences (the “intent” element), and knowing that the property is derived from the predicate offences or from an act of participating in such activities (known as the “knowledge” element). These elements are stipulated in the international texts by using the adverb “intentionally” and “knowing that”. The “knowledge” or “intent” element may be proven by direct evidence, or inferred from the surrounding circumstances and objective factual circumstances, such as the time and place of the offence and motive of the culprit.

In many jurisdictions, however, the burden of proving these elements in money laundering trials has become onerous and has caused a great deal of controversy. In the circumstances, when defendants are third parties (i.e. the criminal proceeds are laundered by persons who are not involved in the commission of the predicate offence), proving “intent” and “knowledge” is a great challenge for prosecutors. For example, if advanced and complicated money laundering typologies, such as the extensive use of shell companies or cyber laundering, are used to hide the trails of criminal proceeds, it is very difficult for a prosecutor to prove the illicit root of property as well as the “knowledge” of the defendant (as a third party) about this illicit root. This also leads to difficulties in proving the degree of “intent” because most defendants will try to deny “knowledge” and “intent”.

In practice, a number of States have facilitated the prosecution of money laundering offences by simplifying what the prosecution is required to prove. They have softened the requirement of “knowledge” in various ways. For example, in the US, the prosecutors have only to prove that the defendant knew that the property represents the proceeds of “some form of unlawful activity”. They need not prove that the defendant knew what “specified unlawful activity” generated the proceeds.<sup>50</sup> Additionally, the burden on the prosecution has also been simplified by the provision that the “actual knowledge” requirement can be met by proving “wilful blindness”.<sup>51</sup> “Wilful blindness” can be understood as “an awareness of a high probability of the existence of a fact and an absence of an actual belief that the fact does

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<sup>50</sup> In *U.S. v. Isabel* 945 F.2d 1193, 1201 (1st Cir. 1991), the court held that the defendant need not have known that the property involved in the financial transaction represented proceeds of a specified unlawful activity.

<sup>51</sup> In *U.S. v. Long* 977 F.2d 1264, 1270 (8th Cir. 1992), a car dealer was held to be wilfully blind to the use of drug trafficking proceeds for the purchasing of a car.

not exist”.<sup>52</sup> For instance, a defendant will be liable if he/she had a “reasonable suspicion” that the property is derived from illegal acts based upon, for example his/her professional knowledge, and life experience, but he/she harboured this suspicion and paid no further attention to it.

In Germany, the Criminal Code allows the conviction of the perpetrator of money laundering even if he/she, through gross negligence, is unaware of the fact that the object is the proceeds of an unlawful act.<sup>53</sup> This regulation aids the prosecution of money laundering, and makes the German AML legislation much stricter.

In some other countries, a very high level of culpability is still required to establish the *mens rea* required for third party laundering. In the Russian Federation, for example, the court must prove that the intent of defendant to “give a legitimate appearance to criminal proceeds”, and that the perpetrator of money laundering knew (as opposed to should have known) that money or other property was derived from criminal means.<sup>54</sup> Thus, in practice, someone who simply disposes of criminal proceeds or makes purchases with money derived from criminal activities without attempting to give legal appearance to these proceeds cannot be convicted of money laundering.

#### **4.3.3      *The Liability and Sanctions for Money Laundering Offences***

##### *Liability for legal persons*

The Palermo Convention (article 10), the UNCAC (article 26) and the 2012 FATF Recommendations (INR 3, par. 7(c) and R24) call for their States Parties and member countries to impose liability on both natural and legal persons. Legal persons are any entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property.<sup>55</sup> This can include companies, bodies corporate, foundations, anstalt (institutions), partnerships, or associations and other relevantly similar entities.<sup>56</sup> Subject to domestic legal principles, liability can be criminal, civil or

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<sup>52</sup> Rachel Ratliff, “Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion” (1995) 7 Stanford Law & Policy Review 173 at 174.

<sup>53</sup> German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n22, section 261(5) provides that “whosoever, in cases under subsections (1) or (2) above is, through gross negligence, unaware of the fact that the object is a proceed from an unlawful act named in subsection (1) above shall be liable to imprisonment of not more than two years or a fine”.

<sup>54</sup> Reynolds, above n19.

<sup>55</sup> FATF, above n14.

<sup>56</sup> Ibid.

administrative. Further, the imposition of liability on legal persons shall not affect the liability of natural persons who committed the offence.<sup>57</sup> The provision of corporate liability for money laundering offences is obviously necessary to deter the involvement of financial intermediaries in money laundering operations.

In those States which are traditionally disinclined to apply criminal liability to legal persons, for example Germany or the Russian Federation, administrative or civil liability is imposed on legal persons who engage in money laundering offences. Under Russian criminal law, for example, only a sane natural person, who has reached the certain age, can be subject to criminal liability.<sup>58</sup> Nevertheless, Russian law imposes civil or administrative liability on a legal person involved in money laundering offences. For example, the authorities can revoke its license, and ultimately subject it to liquidation. Furthermore, natural persons operating on behalf of a legal person can also be prosecuted.

#### *Liability for self-launderers*

Another issue worth mentioning is whether those individuals who have committed the predicate offence may also be held liable for laundering the proceeds of such offence (so-called self-laundering). The Palermo Convention (article 6(2)(e)) and UNCAC (article 23(2)(e)) stipulate that “if required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence”. The reason for this provision is that in some State Parties, the perpetrator of a money laundering offence who also commits the predicate offence cannot be convicted of a money laundering offence. This is the case, for example, in Germany.<sup>59</sup> In other States, the predicate offence perpetrator can be convicted of money laundering. This difference derives mainly from the fundamentals of domestic criminal laws.

According to the principles of German criminal law, whosoever is liable as an accomplice to the act shall not be liable for assistance after the fact.<sup>60</sup> In other words, an offender who has committed the predicate offence cannot be additionally and separately penalized for an “after-act behaviour” that relates to the proceeds of his/her own crime. Further, section 261(9) of the

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<sup>57</sup> See *Palermo Convention*, above n11, article 10(2) and (3).

<sup>58</sup> Reynolds, above n19, article 19.

<sup>59</sup> See Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) at 121; and Sabrina Fiona Preller, “Comparing AML Legislation of the UK, Switzerland and Germany” (2008) 11(3) *Journal of Money Laundering Control* 234.

<sup>60</sup> German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n22, section 257(3)

German Criminal Code provides that a person who is liable for participating in the predicate offence may not be liable for money laundering as well.<sup>61</sup> Accordingly, a perpetrator cannot be convicted of both the predicate offence and laundering its proceeds. In contrast, Russian legislation allows the conviction of predicate crime perpetrator for laundering the proceeds of his/her crime. Articles 174 and 174(1) of Russian Criminal Code (2003) regulate both third-party laundering and self-laundering.<sup>62</sup>

#### *Punishment for money laundering offences*

The suppression conventions set out very broad standards of punishment for their offences. State Parties are obliged to make each of these offences subject to sanctions that take into account the gravity of that offence.<sup>63</sup> Similarly, the FATF recommends that all sanctions against money laundering offences should be effective, proportionate and dissuasive.<sup>64</sup>

In most States which have criminalized money laundering, both natural and legal persons who commit money laundering offences are liable to criminal punishment or civil and administrative sanctions. Criminal punishment may include a fixed-term imprisonment, a fine, and confiscation of illegal gains. Civil and administrative sanctions may include a monetary fine, confiscation, or withdrawal of business licenses from legal persons.

In many States, the maximum punishment for money laundering offences is quite harsh, and is not limited to fiscal punishment but include custodial punishment. This suggests that the offence is considered as a serious offence by several States. Under the US Money Laundering Control Act of 1986, for example, criminal punishment for violating section 1956 of this Act are imprisonment for not more than 20 years, or a fine of not more than US\$500,000 or twice the value of the property laundered (whichever is greater), or both.<sup>65</sup> A violation of section 1957 triggers a fine and/or imprisonment for not more than 10 years, or both.<sup>66</sup> If a financial institution or any officer, director or employee of a financial institution is found guilty of a money laundering offense pursuant to sections 1956 or 1957, the Attorney

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<sup>61</sup> Ibid, section 261(9).

<sup>62</sup> Reynolds, above n19, at 35 and 36.

<sup>63</sup> 1988 Vienna Convention, above n9, article 3(4)(a); Palermo Convention, above n11, article 11(1); and UNCAC, above n25, article 30(1).

<sup>64</sup> FATF, above n26, INR 3(7)(d).

<sup>65</sup> 18 USC § 1956(a).

<sup>66</sup> 18 USC § 1957(b).

General must provide a written notice of conviction to the financial institution's regulatory agency.<sup>67</sup>

But maximum penalties vary. According to the German Criminal Code, natural persons convicted of money laundering under section 261 shall be liable to imprisonment for up to 5 years or a fine.<sup>68</sup> The punishment for money launderings offences under article 174 and 174.1 of the Criminal Code of the Russian Federation may be:<sup>69</sup> i) a fine of the amount of money, or the amount of salary (or other income) of convicted person in a certain time; ii) imprisonment for up to 10 years; or iii) including both (i) and (ii).

These variations in what States consider to be sufficiently dissuasive (deterrence seems to be the underlying principle here), depend ultimately on the scheme of punishment that prevails domestically rather than some global criterion of effective suppression.

#### **4.4 Interim Conclusion**

In summary, although States have strived to comply with the international standards, States still vary in their autonomous criminalization of money laundering. This is because the criminal law of a State is usually underpinned by that State's particular moral and political philosophy. Of all branches of law, criminal law is traditionally the most parochial legal discipline because it is closely associated with the national cultural, economic and political background.<sup>70</sup> A State has sovereignty over the criminalization of certain conduct by labelling that conduct as wrongful and by convicting as culpable wrongdoers. This unavoidably generates differences in criminalization and punishment between States.

The next sections will examine the basic principles of Vietnamese criminal law, and how Vietnam has criminalized money laundering subject to these principles.

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<sup>67</sup> 18 USC § 1956(g).

<sup>68</sup> German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n22, section 261(1) and section 261(5).

<sup>69</sup> Criminal Code of the Russian Federation, above n58.

<sup>70</sup> Markus Dirk Dubber, "Comparative Criminal Law" in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 1430 at 1288-1292.

## 4.5 Basic Principles of Vietnamese Criminal Law

### 4.5.1 *The Sources of Criminal Law*

Vietnamese criminal law has developed substantially since 1985 - the historic moment when the first Penal Code (the 1985 Penal Code) was enacted.<sup>71</sup> The development of Vietnamese criminal law can be traced following its major sources: the Penal Code and amendments to the Penal Code. The 1985 Penal Code, which showed the profound influence of the criminal law of socialist States, was amended and supplemented in 1989, 1991, 1992 and 1997 as a result of the enormous changes in political, economic and social background in Vietnam after the launch of “*Doi Moi*” (renovation). Several wrongdoings that surfaced in the economic transitional period, such as illegal economic or drug-related activities, were criminalized. Additionally, driven mainly by the changes in the nature of certain crimes, such as the growing extent and sophistication of economic crimes and drug-related crimes, the contemporary Penal Code (the 1999 Penal Code)<sup>72</sup> was promulgated in 1999 to replace the 1985 Penal Code. Furthermore, a number of emergent crimes were provided for in the Law Amending and Supplementing to a Number of Articles of the Penal Code<sup>73</sup> - hereafter referred to as the Amendment to the 1999 Penal Code (2009). In Vietnam, criminal law enjoys the pivotal role in maintaining and protecting the socialist regime, the people’s interests and interests of the State. Thus, although a number of significant revisions have occurred, the contemporary Penal Code still consists of several persistent principles of former Soviet Criminal law which were exhibited in the 1985 Penal Code.<sup>74</sup>

The primary sources of contemporary Vietnamese criminal law are the 1999 Penal Code and the Amendments to 1999 Penal Code. Legal interpretation of the Penal Code that consists of legislative, judicial and executive interpretations is another important source of Vietnamese criminal law. The power of these interpretations is vested in the legislature (the Standing Committee of the National Assembly), judiciary (the Supreme People’s Court and

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<sup>71</sup> See John Quigley, “Viet Nam’s First Modern Penal Code” (1988) 9 New York Law School Journal of International and Comparative Law 143 and Nguyen Phuong Khanh, “The Criminal Code of the Socialist Republic of Vietnam” (1987) 13 Review Socialist Law 103.

<sup>72</sup> Bo Luat Hinh Su [*Penal Code*] (Vietnam) Law No. 15/1999/QH10, 21 December 1999, entered into force 1 July 2000.

<sup>73</sup> Luat Sua Doi, Bo Sung Mot So Dieu Cua Bo Luat Hinh Su [*Law Amending and Supplementing to a Number of Articles of the Penal Code*] (Vietnam) Law No. 37/2009/QH12, 19 June 2009, entered into force 1 January 2010.

<sup>74</sup> See those general principles in Harold J. Berman, “Principles of Soviet Criminal Law” (1947) 56(5) The Yale Law Journal 803.

its Judicial Council), and governmental ministries (the Ministry of Public Security).<sup>75</sup> Judicial interpretation can be jointly issued by the Supreme People's Court and the Supreme People's Procuracy (SPP). The SPP is empowered to not only prosecute criminals but also oversee a number of stages in criminal procedure, including the stages of investigation and trial. Legal interpretation is helpful when certain provisions of the Penal Code are vague or too abstract.

#### 4.5.2 *The Doctrine of Crime*

Vietnamese criminal law defines a crime as a socially dangerous act (positive act or omission) that is proscribed in the Penal Code, is committed intentionally or negligently by a person who has the capacity of taking criminal liability, and violates the interests of the people and the society.<sup>76</sup> This definition is similar to the definition of crime in the Russian criminal law - the so-called "material" definition of crime.<sup>77</sup> The definition encompasses both a substantive element (social danger), which is absent from criminal law of continental law States (e.g., Germany),<sup>78</sup> and a formal normative element (the prohibition of act by the Penal Code - *nullum crimen sine lege*).<sup>79</sup> The "material" approach to the definition of crime is justified as follows:<sup>80</sup>

From the theoretical point of view, such an approach points out a relationship between crime and societal life, but societal life understood according to the principles of historical materialism on the class structure of society and the dynamics of societal life... The idea of material content of crime represents a bridge between the conceptual network of criminal law and the principles of historical materialism. By defining a crime as a socially dangerous act, legal theory of socialist States denies metaphysical concepts which define crime as a violation of the laws of nature, as conduct violating God's will, eternal norms of ethics, etc. History shows that at various times and in various societies different acts were considered crimes. Therefore, crime is a societal and historically changing phenomenon. Marxist-Leninist theory of criminal

<sup>75</sup> See further in Bui Thi Bich Lien, "Legal Interpretation and the Vietnamese Version of the Rule of Law" (2011) 6(1) National Taiwan University Law Review 321 at 327 - 332.

<sup>76</sup> *Penal Code*, above n72, article 8(1).

<sup>77</sup> Criminal Code of the Russian Federation, above n19, article 14.

<sup>78</sup> German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n22, section 1.

<sup>79</sup> For more discussion about this definition, see Stanislaw Pomorski, "Communist and their Criminal Laws: Reflections on Ignor Andrejew's 'Outline of the Criminal Law of Socialist States'" (1981) 7(1) Review of Socialist Law 7 at 15 - 18; Anatolyi V. Naumov, "The New Russian Criminal Code as a Reflection of Ongoing Reforms" (1997) 8(2) Criminal Law Forum 191 at 204 - 208 ; and William Burnham, "The New Russian Criminal Code: A Window onto Democratic Russia" (2000) 26(4) Review of Central and East European Law 365 at 367 - 375.

<sup>80</sup> Igor Andrejew, *Ocherk po ugolovnomu pravu sotsialisticheskikh gosudarstv* [Outline of the Criminal Law of Socialist States] (Moscow, 1978) at 56 (as cited in Pomorski, above n79, at 16).



law analyses crime as a changing phenomenon, related to a socio-economic system. Consistent with the premises of historical materialism, the theory considers the gist of the crime to be the fact that it is dangerous to social conditions favourable to the interests of the ruling class. The ruling class through its State apparatus determines which acts are socially dangerous and how they should be prosecuted and punished. In this sense, one says that crime is a class phenomenon.

It can be seen that the adoption of this approach is a commitment to Marxist social theory and has less of theoretical than an ideological function.<sup>81</sup>

Crimes are categorized in four types based on their characters and degree of “social danger” they causes: extremely serious crime (“*toi pham dac biet nghiem trong*”), very serious crime (“*toi pham rat nghiem trong*”), serious crime (“*toi pham nghiem trong*”) and less serious crime (“*toi pham it nghiem trong*”).<sup>82</sup> A wrongful act that presents insignificant “social danger” can be qualified as an “administrative violation”, which is “non-crime”. “Non-crimes” regulated by administrative procedure were spelled out in the constantly updated Ordinances on Handling Administrative Violations (“*Phap Lenh Xu Ly Vi Pham Hanh Chinh*”),<sup>83</sup> which has been recently consolidated in the Law on Handling Administrative Violations.<sup>84</sup>

In some ways, Vietnamese administrative violations are equivalent to misdemeanors or summary offences in common law States. For instance, they are handled by using a less formal administrative procedure, they usually involve a less harmful act and they are usually punished by less severe penalties. Nonetheless, in essence, the dichotomy between crimes and administrative violations (or “non-crimes”) in Vietnam’s legislation is different from the felonies/misdemeanors or indictable/summary classification. Vietnamese administrative violators are not labeled as criminals. Their wrongful acts are not shown in their criminal record. The penalties that may be imposed include a warning, a fine, the revocation of business license or professional practice certificate, confiscation of the objects related to or the means used for the commission of administrative violations, and deportation.<sup>85</sup> Certain

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<sup>81</sup> Ibid.

<sup>82</sup> *Penal Code*, above n72, article 8(2).

<sup>83</sup> Uy Ban Thuong Vu Quoc Hoi, “Phap Lenh Ve Xu Ly Vi Pham Hanh Chinh” [*Standing Committee of the National Assembly, Ordinance on Handling Administrative Violations*] No. 44/2002/PL-UBTVQH10 2 July 2002, entered into force 1 October 2002

<sup>84</sup> *Luat Xu Ly Vi Pham Hanh Chinh* [*Law on Handling Administrative Violations*] (Vietnam) Law No. 15/2012/QH13, 20 June 2012, entered into force 01 July 2013.

<sup>85</sup> Ibid, article 21.

other sanctions may be also applied, for example, the administrative violators may have their property confiscated.<sup>86</sup>

At first glance, the requirement of “social danger” seems similar to the principle of harm in the criminal law of common law States. However, it actually varies according to its application. Because the competent authorities (the National Assembly, the Standing Committee of the National Assembly, the Supreme People’s Court, or the Supreme People’s Procuracy) do not provide explicit direction in assessing “social danger”, the requirement of “social danger” has sometimes caused problems in both the criminalization of a wrongful act and the prosecution of a crime. The distinction between crimes and administrative violations (“non-crimes”) is vague. The category of administrative violations may overlap the category of crimes. In practice, some wrongful acts, such as petty theft (often determined simply by the amount of money involved) or petty fraud in the sale of goods can be either subject to criminal punishment according to the Penal Code or penalty under the Ordinances on Handling Administrative Violations. In order to prosecute a defendant, the prosecutor must prove that the act has caused a significant “social danger”. Even given a culpable state of mind, if the defendant’s act proscribed in the Penal Code harms an individual, but causes an insignificant “social danger”, then the defendant is not subject to criminal punishment.<sup>87</sup> The nature and extent of “social danger” of a certain act is determined by the legislature when criminalizing that act. In trial, in order to impose the appropriate punishment, the court must consider the nature and degree of “social danger” caused by the defendant, based upon the assessment of numerous relevant factors, such as: the purposes and motivations of the defendant, the criminal instruments used, time and place of the crime, the interests violated by the crime, the consequences caused by the crime, including material damages (e.g., damage to people’s health or property) and non-material damages (e.g., undermining the implementation of the policies and directives of the Communist Party as well as of the State).<sup>88</sup> It is clear that these instructions in determining the nature and extent of “social danger” of each crime are vague and broad. In many trials, if the defendants are found guilty and sentenced, the court usually asserts generally that the crime has caused a significant “social danger”, but does not produce an explicit analysis in its judgment about the nature and degree of “social danger” of the crime. The concept of “social danger” raises an interesting

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<sup>86</sup> Ibid, article 17.

<sup>87</sup> *Penal Code*, above n72, article 8(4).

<sup>88</sup> AsianLII (2011), “The Supreme People’s Court of Vietnam: Benchbook Online”, part 2, 6.1.2, available at: <http://www.asianlii.org/vn/other/benchbk/327-en.html> (accessed 12 December 2012).

question what kind of “social danger” money laundering actually causes if it is criminalized. This question will be discussed later in this chapter.

### 4.5.3 *The Principles of Criminal Liability*

According to Vietnamese criminal law, four compulsory factors are required to establish criminal liability:<sup>89</sup> the objective aspect (“*mat khach quan*”) that is equivalent to the *actus reus*; the object (“*mat khach the*”) that refers to the social or people’s interest violated by the crime; the subjective aspect (“*mat chu quan*” or “*loi*”)<sup>90</sup> that is very similar to the *mens rea*; and the subject of crime that is a natural person who has reached a certain age (14 years old) and has the capacity to take criminal liability.<sup>91</sup> In some particular cases, the additional requirements may be the actual causing of “social danger”, causation, motivation or purposes of the crime. These requirements of criminal liability are similar to those in the former Soviet criminal law and current Chinese criminal law.<sup>92</sup>

Inchoate crimes in Vietnamese criminal law relate to preparation for, attempt or voluntary termination of the commission of a crime.<sup>93</sup> The inchoate offence of conspiracy in common law States (e.g., the UK)<sup>94</sup> or continental law States (e.g., the similar German concept)<sup>95</sup> does not exist in Vietnamese criminal law.

Preparation for a crime refers to an act of obtaining the instrument and creating the conditions for the commission of a crime (e.g., planning and removing obstacles). Only a person who is preparing an extremely serious crime (“*toi dac biet nghiem trong*”) or very serious crime (“*toi rat nghiem trong*”) is subject to criminal liability.<sup>96</sup> This act is different from “conspiracy” in that an individual’s act of “preparation” alone can result in their liability. This act is also different from the common law doctrine of “attempt” in that attempt is the act of a more than merely preparation with evidence of the firmness of the intent.

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<sup>89</sup> Pham Van Beo, *Luat Hinh Su Viet Nam - Phan Chung (Sach Tham Khao)* (Nha Xuat Ban Chinh Tri Quoc Gia, 2009) at 145 - 148.

<sup>90</sup> *Penal Code*, above n72, article 9, 10.

<sup>91</sup> *Ibid*, article 13(1) provides that any person who at the time of the commission of the crime is incapable of either appreciating the nature of the conducts or controlling the conducts due to a mental disorder or other diseases bears no criminal liability.

<sup>92</sup> See Berman, above n74, 812 – 820; and Ian Dobinson, “Criminal Law” in Wang Chenguang and Zhang Xianchu (eds) *Introduction to Chinese law* (Sweet & Maxwell Asia, 1997) at 110-114.

<sup>93</sup> *Penal Code*, above n72, articles 17, 18 and 19.

<sup>94</sup> Ashworth, above n49.

<sup>95</sup> German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n53, section 30.

<sup>96</sup> *Penal Code*, above n72, article 17.

Preparation for a crime in Vietnam includes conduct considered only preparatory in common law States.

Voluntary termination of the commission of a crime refers to the situation when a person refuses at his own will to carry out a crime to the end though nothing stands in the way. Vietnamese criminal law does not impose criminal liability on the person who voluntarily terminates the commission of the substantive crime before causing any social danger.

The issue of complicity in Vietnamese criminal law includes the case when two or more persons have jointly and intentionally committed a crime. This provision is generally equivalent to the doctrine of complicity in common law States.<sup>97</sup> When imposing criminal liability in cases of complicity, Vietnamese criminal law differentiates between those who are principals (e.g., organizers, leaders or masterminds) and those who play a secondary role (e.g., aids, abets or counsels the principal). Principals should receive a more severe sentence than their accomplices. Each accomplice shall be subject to separate criminal liability upon the assessment of the “social danger” he causes and his degree of involvement in the commission of the crime. In addition, Vietnamese criminal law categorizes an organized criminal group (or criminal organization) as a form of complicity that has a close-knit and hierarchical structure.<sup>98</sup> In sentencing, the fact that the crime was committed by an organization is an aggravating circumstance because of the increased “social danger” involved.

It is clear that in regard to above-mentioned general principles, Vietnam’s criminal law is significantly different from those of the Western legal systems that served as the model for the criminalization of money laundering. Inevitably, this will make the implementation in Vietnam more difficult.

#### **4.5.4      *The Doctrine of Punishment***

Vietnamese criminal law states that punishment is the most severe coercive sanction imposed by the State on a criminal with the purposes of depriving or restricting his or her rights and interests.<sup>99</sup> Punishment aims at not only punishing and condemning the criminal, but also educating him or her to become a person useful for the society and to obey the law, and preventing him or her from committing other crimes. Further, punishment aims at

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<sup>97</sup> See *ibid*, article 20; and Ashworth, above n49, at 412-438.

<sup>98</sup> *Penal Code*, above n72, article 20(3).

<sup>99</sup> *Ibid*, article 26.

educating other people about the need for of and obedience to law, and about combating crime.<sup>100</sup>

Vietnamese criminal law divides criminal punishment into two groups:<sup>101</sup> i) primary punishment that may entail a warning, a monetary fine, a non-custodial reform, deportation, a fixed-term of imprisonment, life imprisonment, or the death penalty; and ii) complementary punishment that may entail one or more of a range of sanctions, such as prohibition from performing certain jobs, depriving certain citizen's rights, or confiscating property.

#### **4.6 Criminalization of Money Laundering in Vietnamese Criminal Law**

It is worthy of note here that detailed records of the nature of the criminal conduct involved in convictions for money laundering in Vietnam have not been systematized by the competent Vietnamese agencies. Thus, the examination of the criminalization of money laundering is limited to a critical and comparative analysis of the AML-relevant legal provisions and their development.

##### **4.6.1      *The Objective Aspect (Actus Reus – “Mat Khach Quan”)***

###### *The provisions before 2009*

Prior to 2009, although the term “money laundering” was not used, some types of the conduct involved in what was understood elsewhere as money laundering acts were first criminalized in the 1999 Penal Code (articles 250 and 251).

Article 250 of the 1999 Penal Code, which is still valid, criminalizes the act of “harbouring or consuming property derived from criminal activities committed by other persons”:

Those who without prior promise, harbour or consume property, with the full knowledge that it was derived from the commission of a crime by other persons, shall be sentenced to a fine of between five million dong and fifty million dong, non-custodial reform of up to three years or a prison term of between six months and three years.<sup>102</sup>

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<sup>100</sup> Ibid, article 27. For more discussion about the aim of educating of punishment, see Berman, above n74, at 822-824.

<sup>101</sup> *Penal Code*, above n72, article 28.

<sup>102</sup> Ibid, article 250(1)

In this article, “without prior promise” means that a person who harbours or consumes property must not have any prior agreement with the person who committed the predicate crime.<sup>103</sup> Where a person has made such an agreement, he would be charged with the predicate crime itself as an accomplice.

The two forms of conduct, “harbouring” and “consuming”, were not formally defined in any legal documents at this time. In addition, the “intent” element was not provided for in this article. However, the Ministry of Justice of Vietnam advised that the act of “harbouring” includes concealing, acquiring and possessing property; and that “consuming” means to “use”.<sup>104</sup> It appears that “harbouring” and “consuming” do not cover “conversion or transfer” of property, the terms used in the international conventions and both common in Western legal usage. In addition, article 250 does not apply to self-laundering activity. It is confined to property derived from the commission of a crime by other persons - third party launderers.

With regard to convictions under article 250 when the defendant is a third party, 80 per cent of convictions have been based on confessions.<sup>105</sup> In the rest of the cases, convictions have been based on proving possession only and not concealment or acquiring.<sup>106</sup> The reason for this fact could be that it was onerous to prove the high standard of the “knowledge” element (“with the full knowledge”). The fact also may suggest that weak investigative techniques (which rely on the person to give themselves up by confessing rather than sophisticated methods of e.g., forensic accounting) influence the choice by investigators and prosecutors of forms of the offence that are easier to prove such as those based only on possession.

Article 251 of the 1999 Penal Code, which has been amended, provided more specifically for the criminalization of the act of “legalizing money and/or property derived from criminal activities” as follows:

Any person using financial and/or banking operations or other transactions, to legalize money and/or property derived from criminal activities or use such money and/or property to conduct business activities or other economic activities, shall be sentenced to between one and five years of imprisonment.

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<sup>103</sup> APG (2009), “VIETNAM ME1 (Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism)” at 41, available at: <http://www.apgml.org/documents/docs/17/Vietnam%20ME1.pdf> (accessed 20 April 2013).

<sup>104</sup> Ibid.

<sup>105</sup> Ibid, at 49.

<sup>106</sup> Ibid.

The APG's mutual evaluation of Vietnam's AML laws revealed numerous deficiencies in this article in comparison with the international standards.<sup>107</sup> The use of term "legalize" without given definitions is ambiguous. It is not clear to what extent the act of "legalizing" covers the conduct elements of money laundering offences provided by the Palermo Convention,<sup>108</sup> and whether it includes the "intent" element of money laundering offences. The act "legalizing" associated with the typologies of "using financial and/or banking operations or other transactions" appears to cover the acts of "conversion or transfer". The act "using", which was proscribed clearly, appears to overlap the act of "consuming" provided for in article 250. It is noted that both articles 250 and 251 of the 1999 Penal Code do not mention the detailed purposes of the foregoing acts. The "knowledge" element was not stated in article 251. In practice, Vietnamese law enforcement agencies were loath to lay charges under article 251.<sup>109</sup> Although article 251 could apply to self-laundering, a person who had obtained property through a predicate crime and had "legalized" or "used" it was usually charged only with that predicate crime.<sup>110</sup> One of the reasons was that article 251 was ambiguous and there was no sub-law document to interpret this article in more detail.

*The newer AML provisions adopted in Vietnamese law between 2009 and 2011*

The inadequacies of articles 250 and 251 necessitated the introduction of a new crime of money laundering. After the APG's mutual evaluation of Vietnam, the crime of money laundering ("*toi rua tien*") was criminalized formally quite recently in the amended article 251 of the 1999 Penal Code (2009) (hereafter termed the amended article 251). In an effort to comply with the international standards, this article criminalizes the following types of the conduct:<sup>111</sup>

- a) Participating, directly or indirectly, in financial transactions, banking or other transactions that involve money and/or property derived from criminal activities, with the full knowledge that such money and/or property was derived from criminal activities, for the purpose of concealing the illicit origin of such money and/or property;
- b) Using such money and/or property, with the full knowledge that such money and/or property was derived from criminal activities, to conduct business activities or other activities;

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<sup>107</sup> APG, above n103.

<sup>108</sup> *Palermo Convention*, above n11, article 6(1).

<sup>109</sup> The cases illustrated in chapter 2 are the obvious examples of ineffective adoption of article 251.

<sup>110</sup> APG, above n103, at 44.

<sup>111</sup> *Law Amending and Supplementing to a Number of Articles of the Penal Code*, above n73, article 1(34).

- c) Concealing the information about the origin, true nature, location, movement, or ownership of money and/or property derived from criminal activities or impeding the examination of such information;
- d) Committing one of the acts prescribed in a), b) and c) involving money and/or property, with the full knowledge that such money and/or property was derived from the process of transferring, assigning and conversion of the money and/or property generated from criminal activities.

Under the current Vietnamese criminal law, the criminalization of money laundering is provided for in article 250 of the 1999 Penal Code and the amended article 251. For the purposes of these articles, all crimes in the 1999 Penal Code and in the Amendments to the 1999 Penal Code can serve as the predicate crimes for money laundering.

It can be seen that in spite of different wording, the forms of conduct proscribed in the amended article 251 include most of the acts provided for in the international conventions: “conversion or transfer”,<sup>112</sup> “use”,<sup>113</sup> “conceal”,<sup>114</sup> and “participation”<sup>115</sup>. Nevertheless, there are still a number of inadequacies, ambiguous terms and insufficiently detailed definitions. The purpose set out in the conventions of “helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action”<sup>116</sup> is not provided for in the amended article 251. It is not clear what “other transactions”<sup>117</sup> and “other activities”<sup>118</sup> in the amended article 251 mean. The definition of “property” that is clarified in the Palermo Convention is not provided for in the Penal Code.<sup>119</sup> The use of money/property suggests that there is a distinction between them. Thus, it is not clear what types of laundered property fall within the scope of this crime. Further, because of the use of the unclear terms “harbour” and “consume” in article 250, it seems that there is an overlap between article 250 and the amended article 251 in regard to the conduct elements committed by a third party.

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<sup>112</sup> Ibid, the amended article 251(a).

<sup>113</sup> Ibid, the amended article 251(b).

<sup>114</sup> Ibid, the amended article 251(c).

<sup>115</sup> Ibid, the amended article 251(d).

<sup>116</sup> *Palermo Convention*, above n11, article 6(1)(a)(i).

<sup>117</sup> *Law Amending and Supplementing to a Number of Articles of the Penal Code*, above n73, the amended article 251(a).

<sup>118</sup> Ibid, the amended article 251(b).

<sup>119</sup> Article 2(d) of the *Palermo Convention*, above n11, defines “property” as assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets.



### *The complementary provisions from 2011*

Two years after the provision of the amended article 251, an inter-agency Circular on guiding the adoption of article 250 and of the amended article 251 was issued.<sup>120</sup> This Circular was one of the outputs of the project “VNMS65 - Strengthening of the Legal and Law Enforcement Institutions in Preventing and Combating Money Laundering in Viet Nam” (described in chapter 1).<sup>121</sup> The Circular interprets in detail some of the elements of article 250 as well as the amended article 251 and patches up most of the shortcomings of these articles. In investigating and prosecuting money laundering offences, the authorities will use both the amended article 251 and the Circular.

The “financial transactions, banking or other transactions” referred to in the amended article 251(1)(a) are interpreted to include a list of specific activities.<sup>122</sup> The “business activities or other activities” mentioned in the amended article 251(1)(b) include “business activities, service activities, activities of incorporating companies, building schools or hospitals, purchasing properties, economic aids, or doing charities”.<sup>123</sup> “Property” is defined using a similar wording of the definition provided for by article 2(d) of the Palermo Convention.<sup>124</sup> The acts of “harbouring” and “consuming” are also specified.<sup>125</sup> It is noticeable that a category of activities listed as “consuming” overlap a set of activities prescribed by the amended article 251(1)(a). It can be seen that generally Vietnam has transformed the international standards of the *actus reus* into its domestic law.

### **4.6.2      *The Subjective Aspect (Mens Rea – “Mat Chu Quan”)***

Both article 250 and the amended article 251 provide that a person must have carried out the prohibited actions “with the full knowledge” about the criminal origin of laundered

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<sup>120</sup> Bo Cong An-Bo Quoc Phong-Bo Tu Phap-Ngan Hang Nha Nuoc Vietnam-Vien Kiem Sat Nhan Dan Toi Cao-Toa An Nhan Dan Toi Cao, “Thong Tu Lien Tich Huong Dan Ap Dung Quy Dinh Cua Bo Luat Hinh Su Ve Toi Chua Chap Tai San Pham Toi Ma Co va Toi Rua Tien” [*Ministry of Public Security-Ministry of Defence-Ministry of Justice-State Bank of Vietnam-Supreme People’s Procuracy-Supreme People’s Court, Inter-agency Circular on Guiding the Implementation of the Provisions of the Penal Code Regarding Crime of Harbouring or Consuming Property Derived from the Commission of Crime by other Persons and Crime of Money Laundering*] No 09/2011/TTLT-BCA-BQP-BTP-NHNNVN-VKSNDTC-TANDTC (Vietnam), 30 November 2011 [*Circular 09/2011/TTLT-BCA-BQP-BTP-NHNNVN-VKSNDTC-TANDTC*].

<sup>121</sup> UNODC, “*Final Evaluation Report: Project Number VNM/S65*” at 10, available at: [http://www.unodc.org/documents/evaluation/ProjEvals-2012/VNMS65\\_FE\\_Report\\_FINAL\\_rev.pdf](http://www.unodc.org/documents/evaluation/ProjEvals-2012/VNMS65_FE_Report_FINAL_rev.pdf) (accessed 27 May 2013).

<sup>122</sup> See *Circular 09/2011/TTLT-BCA-BQP-BTP-NHNNVN-VKSNDTC-TANDTC*, above n120, article 3(1).

<sup>123</sup> *Ibid*, article 3(2).

<sup>124</sup> *Ibid*, article 1(3).

<sup>125</sup> *Ibid*, articles 2(1) and (2).

money/property. Although officials from the Supreme People's Procuracy advised that the *mens rea* elements ("knowledge" and "intent") can be proved by objective factual circumstances,<sup>126</sup> there has been no provision to clarify the requirement of the "intent" element and how to prove it in practice. As noted earlier in this chapter, the burden of proving these elements has always caused controversies and challenges to prosecutors. It becomes more challenging in the case of a very high level of proof of *mens rea* - "with the full knowledge" - in Vietnamese criminal law which, while compliant with international obligations, is arguably out of step with the trend towards a lower threshold of *mens rea* for money laundering offences in other States' practice.

#### **4.6.3      *The Object and Subject of Money Laundering Crimes***

The money laundering crime falls into the chapter XIX of the Penal Code which denotes to a category of crimes violating the "public security or public order" ("*an toan cong cong, trat tu cong cong*"). Thus, the object of crime ("*mat khach the*"), which denotes the society or people's interest violated by money laundering crimes, is considered to be the "public security or public order". More specifically, it would be the State management of the property derived from the commission of a crime.

It appears that both the public and relevant authorities are not clear about the "social danger" of money laundering crimes, though money laundering may cause significant harms (as discussed in chapter 2). They do not yet have an idea of how to properly weigh the harms caused by money laundering.<sup>127</sup> This may lead to the lack of an authentic commitment to the criminalization of money laundering in Vietnam.

This thesis argues that the concept of "social danger" actually makes quite a suitable general term for the kinds of non-individual specific harms caused by money laundering. As shown in chapter 2, money laundering may cause a significant danger to various aspects of the society.

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<sup>126</sup> APG, above n103.

<sup>127</sup> As noted in chapter 2, the situation is similar to many other countries where the harms of money laundering and the benefits of AML countermeasures are debatable.

#### **4.6.4      *The Liability and Sanctions for Money Laundering Crimes***

##### *Liability for legal persons and for self-launderers*

Similarly to Russian criminal law, legal persons are not subject to criminal liability under Vietnamese criminal law. In accordance with the general principles of Vietnamese criminal law, only natural persons are subject to criminal liability for the commission of crimes provided for in article 250 and the amended article 251. Nonetheless, they shall be subject to administrative penalties if they fail to meet responsibilities set out by AML laws.<sup>128</sup> These penalties include a warning, a fine, revocation of a practicing license or certificate, or confiscation of the means used in the violations.

When it comes to liability for self-launderers, it can be seen that the amended article 251 can apply to self-laundering activity.

##### *Punishment*

Apart from the primary punishments of a fine, non-custodial reform and a fixed-term imprisonment, both article 250 and the amended article 251 provide a complementary penalty of a fine, confiscation of property and a ban from holding certain posts or practicing certain occupations. The maximum punishment under the both articles is imprisonment for up to 15 years. This maximum punishment tariff is relatively high on the range when compared to other States. Money laundering crimes are categorized as various serious crimes under Vietnamese criminal law. The range of sanctions available in Vietnam is sufficiently broad to meet the obligation in the AMLs.

#### **4.7   Comments and Suggestions for Reform**

In general, the criminalization of money laundering by Vietnam has basically complied with the international standards. Nevertheless, a number of inadequacies remain. In addition, the non-existence of convictions under the amended article 251 and insignificant number of convictions under the older article 250 have highlighted the ineffective enforcement of these articles in practice. There are apparently various reasons for this situation, including: i) the unwillingness of the law enforcement agencies to engage in investigating and prosecuting

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<sup>128</sup> Chinh Phu, “Nghị Định của Chính Phủ về Phòng, Chống Rửa Tiền” [*Government, Government Decree on Prevention and Suppression of Money Laundering*] No. 74/2005/ND-CP (Vietnam), 7 June 2005 [*Government Decree 74/2005/ND-CP*], article 24(2).

money launderers; ii) the unwieldy nature of the legal provisions themselves (e.g., the high level of proof of “knowledge”); and iii) insufficient capacity for investigating money laundering (e.g., the lack of experienced investigator as shown in chapter 3).

The lack of a strong and genuine commitment to the criminalization of money laundering in Vietnam as a social necessity has contributed to a substantial gap between the “law in the books” and “law in action”. It seems that Vietnam has criminalized money laundering under the influence of external coercion and socialization rather than based on the indigenous perception of the “social danger” of money laundering itself. The Vietnamese public and even the relevant authorities may question whether money laundering poses a significant “social danger” or harm or simply be ignorant as to its dangers. This doubt or ignorance may result in a reluctance to both implement and enforce the criminalization of money laundering. However, the unclear determination of “social danger” of money laundering could be used as an excuse for the handing down by courts of insignificant convictions for money laundering in Vietnam.

The “all crimes” approach to the predicate crimes for money laundering seems unreasonable and unpersuasive. Can laundering the proceeds produced by “less serious” predicate crimes cause a significant “social danger” or harm? In fact, most “less serious” crimes do not generate substantial criminal proceeds that can cause a significant “social danger”. Thus, is it really necessary to include all “less serious” crimes in the category of predicate crimes for money laundering? Practically, are Vietnamese law enforcement bodies’ resources sufficient to investigate and prosecute money laundering as a separate charge in all or even most cases of the commission of predicate crimes (including less serious crimes) that produce criminal proceeds? The answer to both these questions seems to be no. It appears that by providing an extremely broad scope of predicate crimes, Vietnam has attempted to appease international pressure, rather than taking a pragmatic approach in categorizing predicate crimes.

In order to comply with the international standards and be more practical, the criminalization of money laundering in Vietnam should be complemented by the following law reforms: i) using consistently the term and definition of “property” in the amended article 251, which includes money as defined by the Circular 09/2011/TTLT-BCA-BQP-BTP-NHNNVN-VKSNDTC-TANDT and the Law on Prevention and Suppression of Money

Laundrying,<sup>129</sup> instead of using money/property; ii) simplifying the “knowledge” element, for example, by adopting the above-mentioned model of the US or of Germany, or simply by using the wording “knowing” as in the international conventions instead of “with the full knowledge”; iii) providing the details of the “intent” element; and iv) applying another model of categorization of the predicate crimes (e.g., a specific list of predicate crimes). In addition, the general potential “social danger” caused by money laundering in Vietnam should be interpreted clearly. Depending on that, Vietnamese courts can then specify, articulate and assess “social danger” in individual cases. Vietnamese courts can interpret the potential “social danger” following the same approach to the harms of money laundering, which can be: the erosion of the integrity of financial institutions, the increase in a number of predicate crimes (e.g., drug trafficking and corruption), distortion of fair competition, the loss of tax revenue, and even the instability of the national economy.

#### 4.8 Conclusion

States are being encouraged and/or pressured to make money laundering a criminal offence on the basis of the constituent elements set out in a number of international legal instruments. Nevertheless, because States are sovereign over the criminalization of certain conduct, the criminalization of money laundering varies from State to State. The differences mainly lie in the scope of predicate offences and the *mens rea* element. There are four models of the categories of predicate offences: i) all criminal offences as predicate offences; ii) the offences with a threshold of specified certain standards; iii) a specific list of offences; and iv) the mixture of model (ii) and (iii). Some States have simplified the burden of proof regarding the “knowledge” and the “intent” element in money laundering trials (e.g., the US and Germany), whereas others apply a very high level of proof (e.g., the Russian Federation).

Vietnamese criminal law has a number of unique principles that originated from the former Soviet criminal law. For instance, the “material” definition of crime, that requires a significant “social danger”, distinguishes a crime from an administrative offence. The requisite factors for criminal liability consist of the objective aspect, the object, the subjective aspect and the subject of crime. Money laundering has been criminalized in the Penal Code of

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<sup>129</sup> The definition of “property” in the *Circular 09/2011/TTLT-BCA-BQP-BTP-NHNNVN-VKSNDTC-TANDTC*, above n120 (article 1(3)) is similar to that in the *Luat Phong, Chong Rua Tien [Law on Prevention and Suppression of Money Laundering]* (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013 (article 4(2)).

Vietnam. Nevertheless, the criminalization does not seem to be based on the core principle of “social danger”. Vietnam has criminalized money laundering and is trying to adjust the constituent elements of money laundering crimes in a way which pleases the international community, regardless of the resulting level of effectiveness. The textual analysis of article 250, the amended article 251 and the relevant legal documents has revealed that the criminalization of money laundering has closely complied with the international standards. This fact has reflected that under the mechanisms of the AMLSs diffusion (coercion and State socialization), Vietnam can criminalize money laundering in the “books” according to the international standards. However, when enforcing the criminalization in practice Vietnam has faced various difficulties generated from the lack of political will, the incompatible nature of its own criminal law with the global standards and limited investigative capacity. The investigation and prosecution of money laundering has been hampered by a number of both political and legal factors. Among the suggestions, some should be prioritized which include: i) encouraging the law enforcement agencies to engage in investigating and prosecuting money laundering; ii) applying an appropriate standard of the “knowledge” element and providing the guidance for proving the “intent” element; and iii) applying a pragmatic approach to designating the scope of predicate crimes for money laundering.

## **Chapter 5**

### **JURISDICTION OVER TRANSNATIONAL MONEY LAUNDERING**

#### **5.1 Introduction**

#### **5.2 Fundamental Concepts**

##### *5.2.1 Transnational Money Laundering*

##### *5.2.2 Criminal Jurisdiction under International Law*

##### *5.2.3 The Condition of Double/Dual Criminality*

##### *5.2.4 The Principle of Ne Bis in Idem in Transnational Context*

#### **5.3 Jurisdiction over Transnational Money Laundering**

##### *5.3.1 The Principle of Territoriality and its Variations*

##### *5.3.2 The Nationality Principle*

##### *5.3.3 The Aut Dedere Aut Judicare Principle*

##### *5.3.4 Concurrent Jurisdiction*

#### **5.4 Interim Conclusion**

#### **5.5 Criminal Jurisdiction under Vietnamese Laws and its Application to Transnational Money Laundering**

##### *5.5.1 Ordinary Criminal Jurisdiction*

##### *5.5.2 Criminal Jurisdiction over Transnational Crime*

##### *5.5.3 Comments and Suggestions*

#### **5.6 Conclusion**

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#### **5.1 Introduction**

In the last chapter, we examined the international AMLSs on the criminalization of money laundering. That examination actually focused on one aspect of criminal jurisdiction over money laundering, known as prescriptive jurisdiction, within a national territory. What concerns the international community more is the emergence of transnational money laundering offences that necessitates the extension of criminal jurisdiction beyond national boundaries. States need to establish adequate extraterritorial jurisdiction over transnational money laundering, which include the investigation, prosecution, adjudication, punishment for transnational money laundering offences and confiscation of criminal assets. The establishment of adequate extraterritorial jurisdiction over transnational money laundering

offences aims at eliminating “havens” for the launderers as well as for the laundered property. A State which lacks extraterritorial jurisdiction over money laundering offences cannot prosecute the launderers who have committed money laundering in its territory but are staying abroad, and cannot confiscate the laundered property located overseas.

This chapter is concerned with the international standards, particularly the conditions and principles, for the establishment of national jurisdiction over transnational money laundering offences and the practice of some States. The jurisdictional standards discussed in this chapter are fundamental for other crucial aspects of international cooperation in AML including the cooperation in confiscation of criminal assets, mutual legal assistance and extradition for money laundering offences, which will be examined in the following chapters.

The chapter begins with the concept of transnational money laundering and the general perception of criminal jurisdiction under international law. It then charts the international standards for establishing jurisdiction over transnational money laundering, and their application in some States. Finally, the chapter examines whether Vietnam has implemented adequately those standards and how the current jurisdictional principles provided for in Vietnamese criminal law can be applied to transnational money laundering. In addition, a number of suggestions are made to strengthen the implementation of the AMLSs on jurisdiction in Vietnam.

## **5.2 Fundamental Concepts**

### **5.2.1 *Transnational money laundering***

The term “transnational crime” was first used by the United Nation (UN) Crime Prevention and Criminal Justice Branch at the Fifth UN Congress on the Prevention of Crime and Treatment of Offenders (1975) “in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several States or having an impact on any countries”.<sup>1</sup> Nevertheless, “defining transnational crime is difficult. Transnational crime by its very nature is problematic as it transcends national jurisdictions, as

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<sup>1</sup> Gerhard O.W. Mueller, “Transnational Crime: Definition and Concepts” in Phil Williams and Dimitri Vlassis (eds) *Combating Transnational Crime: Concepts, Activities and Responses* (Routledge, 2001) 272 at 13.



well as parameters of information system and law enforcement agencies”.<sup>2</sup> For the purposes of the Fourth UN Survey of Crime Trends and Operations of Criminal Justice System (1995), transnational crimes were described as “offences whose inception, perpetration and/or direct or indirect effect involved more than one country”.<sup>3</sup> Following this tendency, article 3(2) of the UN Convention against Transnational Organized Crime (Palermo Convention) provides that an offence is “transnational” in nature if it satisfies one of the following features:<sup>4</sup>

- a) it is committed in more than one State;
- b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- d) it is committed in one State but has substantial effects in another State.

It should be noted that the adjective “transnational” usually implies cross-frontier activities, however, an entirely intra-national crime may be justified as a “transnational” crime, for example if it belongs to category (d) of the Palermo Convention provision.<sup>5</sup>

For the discussion of jurisdiction in this chapter, a money laundering offence is considered to be “transnational” if: i) it has one of the alternative features of transnational offences provided for in article 3(2) of the Palermo Convention; or ii) when the predicate crime was committed abroad. It is noticeable that case (i) and (ii) may overlap. Under case (ii), in the circumstance when the predicate crime occurred and generated the proceeds abroad, the money laundering activity would be actually trans-boundary in nature, because the proceeds have been transferred out of the original country. In other circumstances, the nature of the money laundering activity itself may be not transnational, but the investigation and prosecution for such activity may require interstate cooperation. This would be the case, for example, if the cross-border predicate crime was committed in State A and involved State B, and the proceeds were produced and purely laundered in State B. Then if State B wishes to establish its jurisdiction over the money laundering activity, it usually must ensure that the

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<sup>2</sup> *Results of the supplement to the Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice System, on Transnational Crime* (4 April 1995), A/CONF.169/15/Add.1, par. 9.

<sup>3</sup> Ibid.

<sup>4</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003.

<sup>5</sup> This category seems very broad and controversial, because it is difficult to justify how and to what extent an offence committed in one State affects another State.

predicate activity constitutes a crime under its law (double criminality of the predicate crime).<sup>6</sup> For doing so, State B needs cooperation from State A, such as exchanging information or evidence about the predicate activity. Furthermore, if State A also claims its jurisdiction over that money laundering activity, concurrent jurisdiction may arise which will require cooperation to deal with.<sup>7</sup> Many of these problems are explored further below. But first the thesis will deal briefly with general principles of jurisdiction.

### 5.2.2 *Criminal Jurisdiction under International Law*

Jurisdiction is not a unitary concept. It can be defined as “the power of a sovereign to affect the rights of persons, whether by legislation, by executive decrees, or by the judgment of a court”<sup>8</sup>, or “the authority to affect legal interests”.<sup>9</sup> The definition, nature and scope of jurisdiction vary depending on the applied contexts, which can be civil or criminal, domestic or international. In the domestic context, it usually refers to the right of a competent authority to do certain legal acts. Under international law, it can be conceived of as a State’s right to regulate conduct in matters not exclusively of domestic concern.<sup>10</sup> In the international context, jurisdiction becomes a concern when a State, in its effort to promote its sovereign interests overseas, adopts laws that regulate matters not of purely domestic concern.<sup>11</sup> Jurisdiction in international law is usually either legislative, judicial or executive, also known as the powers to prescribe, adjudicate and enforce respectively.<sup>12</sup> In terms of criminal jurisdiction, first, prescriptive (or legislative) jurisdiction, which denotes the authority of a State to criminalize a given act, is established. Then, this jurisdiction is enforced through law enforcement agencies (known as enforcement jurisdiction in the narrow sense, such as to investigate, arrest, detain, prosecute and confiscate criminal proceeds) and courts (adjudicative jurisdiction).<sup>13</sup>

Driven by the principle of sovereign equality and territorial integrity of States, in general, criminal jurisdiction is facultative rather than mandatory. The establishment and exercise of

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<sup>6</sup> This issue will be discussed further later.

<sup>7</sup> Section 5.3.4 of this chapter will discuss more about this matter.

<sup>8</sup> Joseph H Beale, “The Jurisdiction of a Sovereign State” (1923) 36(3) Harvard Law Review 241 at 241.

<sup>9</sup> Christopher L. Blakesley, “United States Jurisdiction over Extraterritorial Crime” (1982) 73(3) The Journal of Criminal Law and Criminology 1109 at 1109.

<sup>10</sup> F. A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil Des Cours 1, 30 (1964-I) at 9.

<sup>11</sup> Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008) at 5-6.

<sup>12</sup> Michael Akehurst, “Jurisdiction in International Law” (1972) 46 British Yearbook of International Law 145.

<sup>13</sup> Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) at 135.

criminal jurisdiction allowed by international law is ultimately a matter for individual States. Nevertheless, the gravity of transnational crime has forced States to sign the suppression conventions in order to establish certain common jurisdictional frameworks over the given offences including money laundering offences.<sup>14</sup> These frameworks provide both binding and permissive jurisdiction. Accordingly, a State Party “shall” assert its jurisdiction over the given offences based upon the principle of strict territoriality or “quasi- territoriality” (the “quasi- territoriality” principle binds the States to establish jurisdiction over specific crimes committed in their flag-vessels and registered aircraft),<sup>15</sup> and “may” extend its jurisdiction over such offences in several ways, beyond their territory.<sup>16</sup> Although the establishment of extraterritorial jurisdiction over these offences is necessary to prevent the offenders from utilizing national borders for the avoidance of prosecution, it is optional. The general principles for the extension of jurisdiction provided for in the suppression conventions include: territoriality and its variations, nationality, passive personality, protective principle, and universality.<sup>17</sup> In addition, the exercise of jurisdiction over transnational crime should have to satisfy certain further conditions and principles, of which the double/dual criminality and the principle of *non bis in idem* (or prohibition of double jeopardy in common law States) are most important. The thesis now charts these fundamental conditions/principles before discussing other jurisdictional matters.

### **5.2.3      *The Condition of Double/Dual Criminality***

#### *General*

The condition of dual/double criminality is traditionally bound up with the basic areas of international criminal law: extradition, the transfer of criminal proceedings and the execution of foreign sentences.<sup>18</sup> With the development of international cooperation in the fight against

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<sup>14</sup> See *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990 (1988 Vienna Convention), article 4; *Palermo Convention*, above n4, article 15; and *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005 (UNCAC), article 42.

<sup>15</sup> *Palermo Convention*, above n4, article 15(1). This binding provision will be described later.

<sup>16</sup> *Ibid*, article 15(2), (3) and (4).

<sup>17</sup> These principles and their application to transnational money laundering will be discussed in section 5.3.

<sup>18</sup> Lech Gardocki, “Double Criminality in Extradition Law” (1993)(27) *Israel Law Review* 288 at 288.

transnational crime, this condition has been perceived as one of the most crucial conditions which can be applied to jurisdiction, extradition and mutual legal assistance (MLA).<sup>19</sup>

It is worth noting that the double criminality condition is not a rule of customary international law. States are not automatically obliged to apply this condition in their mutual relations unless it is provided for in their treaties or domestic laws.<sup>20</sup> In general, this condition, in both cases of MLA and jurisdiction, is fulfilled when the act is punishable under the criminal laws of both States. Nonetheless, double criminality as a condition to jurisdiction is to be distinguished from double criminality as a condition to MLA and extradition.

The requirement of double criminality as a condition to jurisdiction, which is common in civil law States,<sup>21</sup> relates to the question of whether the act is punishable under the law of the place of commission (*lex loci delicti*). The rationales behind this condition are derived primarily from State sovereignty, international solidarity and the legality principle.<sup>22</sup> When a crime is committed in State A and prosecuted in State B, the court in State B would, if applying the condition, raise a central question whether the act is punishable not only under the law of State B but also under the law of State A. An exception is in the case of universal jurisdiction applicable to *jus cogens* international crimes,<sup>23</sup> in which jurisdiction is conferred based on place of arrest (*judex deprehensionis*), regardless of the place where the crime was committed.<sup>24</sup>

Double criminality can be justified *in abstracto* or *in concreto*. Generally speaking, double criminality *in abstracto* is fulfilled when there is merely the existence of criminalization of the act under the criminal laws of both States concerned. In a further consideration, some scholars suggest that double criminality *in abstracto* should comprise three cumulative components:<sup>25</sup> i) the existence of a legal norm prohibiting the act in both States; ii) the act is

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<sup>19</sup> The extended scope of MLA in the fight against transnational crime, including money laundering, will be provided in chapter 7.

<sup>20</sup> A.H.J. Swart, "Human Rights and the Abolition of Traditional Principles" in John Dugard and Christine van den Wyngaert (eds) *International Criminal Law and Procedure* (Dartmouth, 1996) at 520.

<sup>21</sup> C Wyngaert, "Double Criminality as a Requirement to Jurisdiction" in John Dugard and Christine van den Wyngaert (eds) *International Criminal Law and Procedure* (Dartmouth Publishing Co Limited, 1996) at 138.

<sup>22</sup> Ibid, at 140-142.

<sup>23</sup> These crimes include, e.g., genocide, crimes against humanity, and war crimes. See M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" (2002) 42(4) *Virginia Journal of International Law* 81 at 96-108.

<sup>24</sup> Donnedieu de Vabres, "The System of Universal Jurisdiction: Historical Origins and Contemporary Forms" (2011) 9(4) *Journal of International Criminal Justice* 905 at 909-913.

<sup>25</sup> S. Z Feller, "Significance of the Requirement of Double Criminality in the Law of Extradition" (1975) 10 *Israel Law Review* 51 at 70.

punishable in both States, in respect of the law applicable at the time the act was committed as compared with the law applicable at the time of the legal proceedings; and iii) the act is punishable under the laws of both States in respect of the place where the act was committed. Double criminality *in concreto* goes beyond the fulfillment of double criminality *in abstracto*. It includes the elements of double criminality *in abstracto* illustrated above, and takes into account the concrete circumstances of the act from the point of view of criminality liability, such as age and sanity of the doer, various grounds for the negation and exemption of criminal liability.<sup>26</sup>

#### *Double criminality of the predicate crime*

The concern about double criminality of the predicate crime as a requirement for jurisdiction over money laundering will arise when the jurisdiction asserted by a State over the money laundering offence requires a link to the specific predicate crime, and this predicate crime was not committed in that State. Specifically, when State A asserts jurisdiction over a money laundering act that involves the proceeds from the predicate crime committed in State B, whether State A should require double criminality of the predicate crime.

According to the concept of money laundering, one of the elements that have to be proved when asserting jurisdiction over a money laundering act, is that the property laundered must originally be criminal proceeds. In the above hypothetical case, under the criminal law of State B, the proceeds are criminally generated from the predicate criminal activity which occurred in State B. It seems irrational when State A establishes jurisdiction over the money laundering act that it may do so without requiring that this predicate activity must also constitute a criminal offence under its law. State A should require double criminality in respect of the predicate crime to secure the legality principle. For example, the Palermo Convention states that “offences committed outside the jurisdiction of the State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence in the domestic law of the State Party implementing or applying this article had it been committed there”.<sup>27</sup> In practice, States, like Germany, require this condition.<sup>28</sup>

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<sup>26</sup> Ibid, at 71.

<sup>27</sup> See *Palermo Convention*, above n4, article 6(c)

<sup>28</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) at 228-229.

Another issue is whether States should require double criminality of the predicate crime *in abstracto* or *in concreto*. In the practice of prosecution for money laundering offences, it is burdensome to prove the precise criminal origin of proceeds generated from a predicate crime *in concreto*, especially when the predicate crime was committed abroad. Hence, most States, in the same situation as State A (where the money laundering offence occurs), only require double criminality of the predicate crime *in abstracto* for the prosecution of the money laundering offence under its law.<sup>29</sup> However, of course, for the purpose of prosecution for the predicate crime under the criminal law of State B (where the predicate offence occurs), State B generally requires that crime to be *in concreto* punishable under its law.<sup>30</sup>

#### 5.2.4 *The Principle of Ne Bis in Idem in a Transnational Context*

The recognition of multiple principles for the exercise of jurisdiction over transnational crime may lead to the situation in which the conduct in question is subject to the concurrent criminal jurisdiction of two or more States. In this situation, the transnational application of the *ne bis in idem*<sup>31</sup> principle, a continental equivalent of the common law principle against double jeopardy,<sup>32</sup> functions as a bar to new prosecution or enforcement of penalties for the same offence (enforcement jurisdiction).

The application of the *ne bis in idem* principle at a national level is provided for in the International Covenant on Civil and Political Rights as follows: “no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”.<sup>33</sup> Recognized by almost every State,<sup>34</sup> the principle is

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<sup>29</sup> Ibid, at 230.

<sup>30</sup> Ibid, at 231.

<sup>31</sup> This phrase is interpreted differently into English by numerous authors. In general, this principle prevents a person from being subject to multiple trials and punishment for the same criminal offence by courts of same State.

<sup>32</sup> The term “double jeopardy” was generated from the wording of the Fifth Amendment of the US Constitution, which stipulates, inter alia, that “[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb”. See general about the history of the principle against double jeopardy in Jay A Sigler, “A History of Double Jeopardy” (1963) 7(4) *The American Journal of Legal History* 283.

<sup>33</sup> See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, entry into force 23 March 1976, article 14(7). It has been suggested to be a principle of transnational criminal law: on See John A.E Vervaele, “Ne Bis in Idem: Towards a Constitutional Principle in Transnational Criminal Law?” in (2013) 9 *Utrecht Law Review* 211 at 226.

<sup>34</sup> This principle is stated as a fundamental constitutional right in numerous States. For example, article 103(3) of German Constitution (also known as Basic Law for the Federal Republic of Germany) states that “no

traditionally applied to purely domestic justice as a fundamental procedural safeguard for defendants facing criminal proceedings.

The principle is emphasized in the case law of many different States. Once a case has been disposed of, it should not be reopened; and, the final outcome of a judicial proceeding should be respected and accepted by other courts (the doctrine of *res judicata*).<sup>35</sup> The principle is derived from the following basic rationales: i) protection of the legal interests of the defendant and avoidance of the increased responsibility of the defendant through further prosecution for the same offence; and ii) respect for the final judgment in order to prevent the risk of conflicting judgments.<sup>36</sup> It should be noted here that many States consider that the combination of criminal sanctions with administrative sanctions or out-of-court settlements for the same offence, does not violate this principle. Thus, civil confiscation of criminal assets, which will be discussed in chapter 6, does not violate the principle *ne bis in idem*.

The application of the *ne bis in idem* principle to a transnational context is supported by most the same rationales as at the national level. The transnational application of the *ne bis in idem* principle was initiated by member States of the European Communities in 1987.<sup>37</sup> Article 54 of the Schengen Implementation Agreement (1990) provides that “a person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party”.<sup>38</sup> Eurojust<sup>39</sup> also implies the *ne bis in idem* principle in its guidance

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person may be punished for the same act more than once under the general criminal law”. See “Basic Law for the Federal Republic of Germany (Translated by Professor Christian Tomuschat and Professor David P. Currie)” (2010), available at: <https://www.btg-bestellservice.de/pdf/80201000.pdf> (accessed 13 June 2013).

<sup>35</sup> Christine Van Den Wyngaert and Guy Stessens, “The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions” (1999) 48(4) International and Comparative Law Quarterly 779 at 781.

<sup>36</sup> Ibid, at 780-782.

<sup>37</sup> *Convention between the Member States of the European Communities on Double Jeopardy*, 25 May 1987, entry into force 6 April 1994. Article 1 of the convention states that “a person whose trial has finally been disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a sanction was imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State”.

<sup>38</sup> *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (“Schengen Implementation Agreement”)*, signed on 19 June 1990 at Schengen, entry into force 1 September 1993. This convention was adopted by the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands (referred to as Contracting Parties).

<sup>39</sup> Eurojust, established in 2002, aims at strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious crimes affecting two or more the EU Member States. Eurojust consists of 27 national members who are judges, prosecutors or police officers of equivalent

to deal with the jurisdictional concurrence in cross-border cases.<sup>40</sup> Nevertheless, many continental law States (and many others) do not recognize the *res judicata* effect of foreign criminal judgments.

The cross-border application of the *ne bis in idem* principle is controversial and limited. Controversy surrounding the recognition of foreign judgment on transnational crime is a primary hindrance to its application. Specifically, if authorities of one State take judicial steps against the alleged perpetrator of a transnational crime, will the outcomes of this procedure be recognized as binding on the concerned judicial bodies of the other States which also assert jurisdiction over the transnational crime? In addition, some States tend to apply the *ne bis in idem* principle *in abstracto*, whereas others prefer the *in concreto* application.<sup>41</sup> In practice, because there is no concrete provision of international law that makes the principle of *ne bis in idem* mandatory at the international level,<sup>42</sup> States are often unwilling to recognize the validity of a foreign criminal judgment on the crime that happened in their territory. The recognition is normally based on bilateral or multilateral treaties dealing with judicial cooperation in criminal matters.

### 5.3 Jurisdiction over Transnational Money Laundering

It was pointed out above that State Parties to the suppression conventions either “shall” or “may” establish their jurisdiction over the certain offences criminalized by these conventions, including money laundering offences, on different basic principles: territoriality and its variations, nationality, passive personality, protective principle, and universality.

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competence (see Eurojust, “History of Eurojust”, available at: <http://eurojust.europa.eu/about/background/Pages/History.aspx> (accessed 19 June 2013)). More about the history, functions and practice of Eurojust in Annika Souminen, “The Past, Present and the Future of Eurojust” (2008) 15 Maastricht Journal of European and Comparative Law 217 at 217-228.

<sup>40</sup> Eurojust (2003), “Annual Report 2003 (Annex), Guidelines for Deciding ‘Which Jurisdiction Should Prosecute?’ ” at 61, available at:

<http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202003/Annual-Report-2003-EN.pdf> (accessed 15 June 2013).

<sup>41</sup> Gerard Conway, “Ne Bis in Idem in International Law” (2003) 3(3) International Criminal Law Review 217 at 227-228.

<sup>42</sup> Article 15(5) of the Palermo Convention only suggests that “if a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions”.



Nevertheless, not all these principles are applicable to the establishment of jurisdiction over transnational money laundering.

The passive personality principle, which grants jurisdiction to the State of which the victim is a national, does not work in case of money laundering offences since victims of money laundering offences are hardly individualized.

It is controversial whether a money laundering offence committed abroad by aliens injures vital protected national interests. The harms or risks of harm, as identified in chapter 2, are caused by territorial money laundering offences rather than extraterritorial ones. Thus, the protective principle, which gives a State criminal jurisdiction over extraterritorial conduct of aliens that violates the vital protected national interests of that State, seems not to be applicable to money laundering offences.

When it comes to the absolute universality principle, this principle grants every State jurisdiction over an offender founded in the territory of that State, provided that the offence committed by the offender must belong to the category of *jus cogens* international crimes,<sup>43</sup> regardless of where the offence is committed. The money laundering offence is not among these offences, thus this principle is of no use in respect of the money laundering offence.

How can the other jurisdictional principles be applied to transnational money laundering? The thesis will focus mainly on the jurisdictional principles described in the 1988 Vienna Convention, the Palermo Convention and the UNCAC, since these suppression conventions all contain obligations to the jurisdictional aspects of money laundering and Vietnam is a Party to them all.

### **5.3.1      *The Principle of Territoriality and its Variations***

#### *General*

Criminal jurisdiction is primarily territorial or, in other words, based upon the principle of territoriality. This principle is accepted as the most substantial basis for a State to claim criminal jurisdiction over an offence committed within its own territory. The 1988 Vienna Convention,<sup>44</sup> the Palermo Convention and the UNCAC<sup>45</sup> all require that each State Party to establish jurisdiction over given offences, including money laundering offences, upon the

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<sup>43</sup> Bassiouni, above n23.

<sup>44</sup> 1988 Vienna Convention, above n14.

<sup>45</sup> UNCAC, above n14.

strict territorial or “quasi-territorial” basis. Specifically, article 15(1) of the Palermo Convention states as follows:

Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

- (a) The offence is committed in the territory of that State Party; or
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

Crimes that occur only within a State are unquestionably territorial. But in practice, transnational crime often occurs in more than one State, therefore, questions in regard to which State’s territory the crime is considered to have been committed, and thus which State may exercise territorial jurisdiction over the crime arise. State Parties have employed various approaches to extend their territorial jurisdiction, of which the ubiquity and subjective and objective territoriality theories are dominant.

The theory of ubiquity is widely used in continental law States. Under this theory, an offence is deemed to have occurred on the territory of a State as soon as any constituent element of this offence has occurred on that territory; hence, the State has its jurisdiction over such offence. The German Criminal Code interprets place of an offence, including in respect of acts of participation in the offence as follows:<sup>46</sup>

- (1) An offence is deemed to have been committed in every place where the offender acted or, in the case of an omission, should have acted, or in which the result if it is an element of the offence occurs or should have occurred according to the intention of the offender.
- (2) Acts of secondary participation are committed not only in the place where the offence was committed, but also in every place where the secondary participant acted or, in the case of an omission, should have acted or where, according to his intention, the offence should have been committed. If the secondary participant to an offence committed abroad acted within the territory of the Federal Republic of Germany, German criminal law shall apply to the secondary participation even though the act is not a criminal offence according to the law of the locality of its commission.

The theories of subjective and objective territoriality are used in the US. The subjective territoriality theory grants US courts’ jurisdiction over an offence when a constituent element of the offence occurred within its territory, even though the offence was consummated

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<sup>46</sup> “German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*)” (2009), available at: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf) (accessed 12 December 2012).

outside the US territory.<sup>47</sup> In accordance with the objective territorial theory (also known as the “effects” theory), a harmful effect of an offence within national territory suffices to grant that State jurisdiction over that offence, regardless of whether the effect is a constituent element of the offence. US courts have jurisdiction over conduct committed abroad that results in detrimental effects within the US.<sup>48</sup> Further, there is an expansion of the objective territorial theory of jurisdiction over thwarted cross-border drug conspiracies, where the conspiracies took place entirely abroad (no overt acts within the US) and was thwarted before any drug was imported (no actual harmful effect occurred).<sup>49</sup> In these cases, the “intended effects” suffices to assert jurisdiction. Nevertheless, this application does not fit the notion of the objective territorial jurisdiction which requires an actual harmful effect within national territory. In some thwarted cross-border drug conspiracies cases, the courts could not explain clearly which precise theoretical base had been employed for their assertion of jurisdiction. Thus, a hybrid theory, that is a combination of the objective territorial and protective principles, is suggested as a theoretical basis for justification of the jurisdiction over thwarted cross-border drug conspiracies.<sup>50</sup>

In fact, both the theories of ubiquity and of subjective and objective territoriality are problematic when applying to the transnational context, as domestic law rather than international law determines the constituent elements of a particular offence. In addition, States vary in their conceptualization of inchoate offences and in exercising their territorial jurisdiction over cross-border inchoate offences.<sup>51</sup> For example, many States do not criminalize conspiracy (e.g., Russia and, importantly for the purposes of this thesis, Vietnam), or if they do, their criminalization often differs significantly from each other in scope and nature.

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<sup>47</sup> In *U.S. v. Inco Bank & Trust Corp.*, the court held that “member of conspiracy, that took place both in the United States and in foreign country could be convicted of engaging in conspiracy, even though member performed no overt act within the United States”, and that “a conspiracy occurring partly within the United States is prosecutable without resort to any theory of extraterritorial jurisdiction”. See *U.S. v. Inco Bank & Trust Corp.*, 845 F.2d 919 (11th Cir. 1988) 919, 920.

<sup>48</sup> In *Rivard v. U.S.*, the “effect” theory supported the US prosecution of Canadian nationals for conspiracy to smuggle heroin into the US. Although the conspiracy was formed abroad, several overt acts, which were committed by a co-operator within the US in the furtherance of the conspiracy, imposed harmful effect on the US. See *Rivard v. U.S.*, 375 F.2d 882 (5th Cir. 1967).

<sup>49</sup> In *United States v. Ricardo*, the court held that “when the statute itself does not require proof of an overt act, jurisdiction attaches upon a mere showing of intended territorial effects”. See *United States v. Ricardo*, 619 F.2d 1124 (5th Cir. 1980) 1129.

<sup>50</sup> Blakesley, above n9, 1113.

<sup>51</sup> Cedric Ryngaert, “Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law” (2009) 9 *International Criminal Law Review* 187, 202-208.

### *Territorial jurisdiction over transnational money laundering*

In the law of most States, money laundering is invariably conceived of as a “conduct offence” and not as a “result offence”. The harmful effect of money laundering offences is usually not a constituent element of the offences. Hence, only the subjective territoriality theory can be applied to establishing jurisdiction over transnational money laundering. Due to the broad category of different types of money laundering conduct, if being applied the subjective territoriality theory is therefore likely to result in a multiplication of jurisdiction over the same money laundering scheme. A money laundering scheme often consists of many single acts, and each of them may constitute a separate money laundering offence. States may consider money laundering as made up of different kinds of conduct (the “separated” approach) or amalgamate it (the “collective” approach). In some States, which take the “collective approach”, all money laundering offences stemming from conducts involving the same money laundering scheme are amalgamated in one “collective” offence. This is the approach adopted in Vietnam. In other States, for example in the US, each money laundering act, which can be separately identified under the extensive definition provided for by the Money Laundering Control Act of 1986,<sup>52</sup> can result in a separate indictment (the “separated” approach).<sup>53</sup> The US exercises territorial jurisdiction over anyone who “transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the US to or through a place outside the US or to a place in the US from or through a place outside the US”.<sup>54</sup> In addition, under section 1956(f) of 18 USC, there is extraterritorial jurisdiction over the money laundering offence committed by a non-US citizen which occurs in part in the US and involves funds or monetary instruments of a value exceeding US\$10,000, even if the defendant has not been physically present in the US during the commission of the offence.<sup>55</sup> This seems to be by far the most popular approach for States to establishing extraterritorial jurisdiction over money laundering.

Furthermore, the subjective territorial principle can give rise to jurisdictional concurrence, because every State, on whose territory a constituent element of the money laundering

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<sup>52</sup> *Money Laundering Control Act of 1986*, Pub L No 99-570, §§ 1351-1367, 1986 (The United States), 100 Stat. 3207.

<sup>53</sup> Aileen Chang and Andrew M. Herscovitz, “Money Laundering” (1994) 32 *American Criminal Law Review* 499 at 513-514.

<sup>54</sup> 18 USC § 1956(a)(2).

<sup>55</sup> In *United States v. Stein*, the court found that a foreign citizen, who makes a wire transfer of funds from or to the US while being abroad, is deemed to have acted “in part” in the US. In this case, a defendant, who initiated a transfer of funds from a place within the US to a place abroad without the physical presence in US, is subject to extraterritorial jurisdiction. *United States v. Stein*, No. 93-375, 1994 WL 285020 (E.D.La. 1994) 2-5.

offence occurred, can claim jurisdiction over the entire money laundering offence. The question of how to address the jurisdictional concurrence and protect a person who has already been (or is being) prosecuted/or tried abroad for the same money laundering scheme, will be discussed later in this chapter.

The objective territorial theory is strictly applied to the offences enumerated in article 15(2)(ii) of the Palermo Convention which are actually the fourth type of conduct falling under money laundering offences - “participation in, association with, conspiracy,...”.<sup>56</sup> A Party may establish jurisdiction over any of these offences committed outside its territory with a view to the commission of money laundering offences within its territory.<sup>57</sup> The use of “with a view” indicates that the theory may extend to “intended effects” within a State’s territory in spite of the difficulties with this principle.<sup>58</sup>

### 5.3.2 *The Nationality Principle*

Under the nationality (or active personality) principle, a State can assert criminal jurisdiction over its nationals, even when they are found outside their territory, and even when the perpetrator is no longer a national or has only become a national after committing the crime.<sup>59</sup> From the perspective of international law, this principle is underpinned by the rationale that a State retains its sovereignty internationally over each national, even though traveling or residing abroad.<sup>60</sup> As a result, the State can, based on allegiance, assert criminal jurisdiction over the acts of one of its nationals deemed criminal under that State’s laws.<sup>61</sup>

In accordance with the jurisdictional provisions provided for in the 1988 Vienna Convention, the Palermo Convention and the UNCAC, State Parties may establish extraterritorial jurisdiction over money laundering offences committed abroad by their own

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<sup>56</sup> *Palermo Convention*, above n4, article 6(1)(b)(ii). Four types of conduct of money laundering offences are described in chapter 4.

<sup>57</sup> *Ibid*, article 15(2)(ii).

<sup>58</sup> UNODC (2004), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* at 111, available at: [http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf) (accessed 21 April 2013).

<sup>59</sup> Ryngaert, above n11, at 88.

<sup>60</sup> Christopher L. Blakesley and Otto Lagodny, “Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law” (1991) 24(1) *Vanderbilt Journal of Transnational Law* 1 at 25.

<sup>61</sup> M. Cherif Bassiouni (ed) *International Criminal Law* (Transnational Publishers, New York, 1986) at 23.

nationals.<sup>62</sup> Under these provisions, unlike the strict territoriality principle, the nationality principle is optional rather than mandatory. In addition, an extended application of the nationality principle is the permissive jurisdiction over habitual residents. Article 15(2)(b) of the Palermo Convention and article 42(2)(b) of the UNCAC provide that a State Party may establish jurisdiction when “the offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory”.

Although the nationality principle is universally recognized, its application varies significantly from State to State. Continental law European States, such as France and Germany, apply this principle in a substantially expansive manner. Article 113-6 of the French Penal Code, for instance, allows assertion of jurisdiction over almost every crime in French law, including money laundering, committed by French nationals outside French territory, provided that the conduct is punishable under the law of the country in which it was committed. The German Criminal Code states that “German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender was German at the time of the offence or became German after the commission”.<sup>63</sup>

On the other hand, common law States have traditionally been reluctant to apply this jurisdictional principle. States often limit the application of nationality principle to given offences because of numerous reasons. One of the reasons is that the territoriality and nationality principles and the incidence of dual nationality create parallel jurisdictions and possible double jeopardy.<sup>64</sup> The US exercises its jurisdiction on this principle over a relatively small number of offences which impact on some important State interest, including money laundering offences.<sup>65</sup>

It is worth mentioning that the application of the nationality principle to foreign corporate crime, which may include money laundering, relates to a series of debatable issues, such as the issue of determining nationality and legal status (whether corporation is recognized) of corporation. Other issues include whether the State involved accepts corporate criminality and how the condition of double criminality is applied if required. In fact, because there is no international unification of rules for the award of nationality of a corporation, the same

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<sup>62</sup> *Palermo Convention*, above n4, article 15(2)(b); and *UNCAC*, above n14, article 42(2)(b).

<sup>63</sup> German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*), above n46, section 7(2)1.

<sup>64</sup> Ian Brownlie, *Principles of Public International Law* (7 ed, Oxford University Press, 2008) at 304.

<sup>65</sup> 18 USC § 1956(f) implies extraterritorial jurisdiction over the money laundering offence committed by a US citizen which involves funds or monetary instruments of values exceeding US\$10,000. See more about the nationality principle in Bassiouni, above n61, 25-27; and Blakesley and Lagodny, above n60, at 25-32.

corporation may have different nationalities. Common law States usually adhere to the rule that a corporation is granted the nationality of the State under whose law it has been incorporated. Other States (e.g., France and Germany) determine a corporate entity's nationality based upon its principal centre of business.<sup>66</sup>

### 5.3.3 *The Aut Dedere Aut Judicare Principle*

The *aut dedere aut judicare* (extradite or prosecute) principle refers to the alternative obligation to extradite or prosecute, which is often contained in multilateral treaties to secure the prosecution for crimes of international concern.<sup>67</sup> It generally obliges a State Party, in whose territory an alleged offender is found, either to extradite the offender (if it does not prosecute) to another State Party which is prepared to try him, or to prosecute him (if it does not extradite because of certain grounds). In order to do so, this principle imposes two legal obligations on State Parties: i) to set up their law that if they refuse/fail to extradite, they must establish their own jurisdiction; and ii) to exercise that jurisdiction in a particular case if they refuse/fail to extradite. This principle is sometimes known as “subsidiary” universality.<sup>68</sup>

Included in most suppression conventions,<sup>69</sup> the *aut dedere aut judicare* principle can operate in a case of exercising enforcement jurisdiction over transnational money laundering as follows. Assuming that an alleged offender, who is a national living in State B, committed a money laundering offence involving State A. State A has established its jurisdiction over that money laundering offence on the basis, for example, of the principle of subjective territoriality. State B, aware of State A's jurisdiction, has found the alleged offender in its territory. State A makes an extradition request to State B. If State B refuses to extradite, for example on the ground that the alleged offender is its national, State B must “submit the case to its competent authorities for the purpose of prosecution”, given that State B has law which enables it to exercise jurisdiction in such a situation.

The operation of this principle is usually conditional. The requested State is often bound to initiate the prosecution over the offences in the suppression conventions (including money laundering) if the extradition is refused only on the grounds listed in article 4(2)(a) of the

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<sup>66</sup> Stessens, above n28, at 233-234.

<sup>67</sup> M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers, 1995) at 3.

<sup>68</sup> Boister, above n13, at 148.

<sup>69</sup> 1988 Vienna Convention, above n14, articles 4(2) and 6(9); Palermo Convention, above n4, articles 15(3) and 16(10).

1988 Vienna Convention (when the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or when the offence has been committed by one of its nationals), or listed in article 16(10) of the Palermo Convention (only when an alleged offender is one of its nationals). Usually, if the grounds upon which the extradition is refused are other than these, the requested State is under no mandatory obligation to initiate the prosecution.

According to the wording of “submit” in article 6(9) of the 1988 Vienna Convention and article 16(10) of the Palermo Convention, once the requested State establishes the jurisdiction, there is no mandatory obligation to prosecute. The requested State remains free to exercise its criminal jurisdiction subject to its domestic law. It is only required to “take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law”.<sup>70</sup>

#### **5.3.4      *Concurrent Jurisdiction***

##### *General*

In the case of transnational crime, the States concerned can assume their jurisdiction over the crime based upon the different aforementioned principles, and competing jurisdiction may occur. Nevertheless, neither general international law nor the suppression conventions provide a hierarchical application of jurisdictional principles.<sup>71</sup> Thus, States normally do not have to struggle with the question of whether their own law permits them to establish jurisdiction over the crime, but rather which of the competing States has the most appropriate jurisdiction. In practice, although it is difficult to give detailed concrete guidelines or mechanisms for prioritizing concurrent criminal jurisdiction claims at the international level, some general suggestions have been given. The suppression conventions suggests that “States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution”.<sup>72</sup> In another approach, Eurojust suggests that the prosecution should take place in the State “where the majority of the criminality occurred or where the majority of the loss

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<sup>70</sup> *Palermo Convention*, above n4, article 16(10).

<sup>71</sup> Boister, above n13, at 152.

<sup>72</sup> *Palermo Convention*, above n4, article 21; and *UNCAC*, above n14, article 47.



was sustained”, and that a number of factors should be taken into account in deciding which State is the most appropriate forum for the prosecution.<sup>73</sup> In addition, the UN’s report on economic fraud also recommends elaborate criteria which should be considered to decide the most convenient forum for the prosecution for transnational frauds, when more than one State has jurisdiction and wants to prosecute.<sup>74</sup> These criteria are:

- (a) The State which has suffered from the greatest direct and indirect harm. Harm provides incentive and justification for the prosecution. This State also usually has available evidence;
- (b) The State in which most of the elements of the offence were committed;
- (c) The State that has the greatest investment for investigative efforts in the case. This State usually has the commitment of resources and more evidence for prosecution;
- (d) The location of witnesses and evidence. Transferring evidence may cost significantly, and may affect the legal admissibility of the evidence;
- (e) The State that has the strongest case;
- (f) The State with the best capacity. States with extensive experience and resources may take prosecution, if that is legally feasible, or assist another State that has a claim but less capacity;
- (g) The nationality of the offender and whether he or she can be extradited;
- (h) Other offences involved or which may be prosecuted;
- (i) Other offenders that are involved or may be prosecuted;
- (j) The respective sentencing regimes. States are normally willing to cede jurisdiction to other States with similar punishment for the crime committed.

The UN’s recommendation can be used when dealing with the jurisdictional concurrence over other transnational crimes, such as money laundering. The above suggestion and recommendation appears to indicate a tendency towards the application of the conflict of laws approach, such as the “centre of gravity” principle<sup>75</sup> and the *forum non conveniens*

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<sup>73</sup> Eurojust, above n40, at 62-66.

<sup>74</sup> United Nations, “*Results of the Second Meeting of the Intergovernmental Expert Group to Prepare a Study on Fraud and the Criminal Misuse and Falsification of Identity*” UN Doc. No. E/CN.15/2007/8/Add.2, 2 April 2007, at 17-19.

<sup>75</sup> In Boister, above n13, at 153, the author recommends the adoption of the “centre of gravity” approach in favouring the State with the most interests in prosecution. He also pointed out the evidence of the movement towards this approach. The “centre of gravity” or “grouping of contract” theory, which is used widely by the US conflict of laws, is defined as “the theory under which the courts lay emphasis upon the law of the place which has the most significant contacts with the matter in dispute”. This theory was first applied by New York’s court to tort cases, then has been recognized and applied to both contracts and torts. In practice, although this theory varies in its application to these areas of law, generally it prefers the law of state which

doctrine,<sup>76</sup> to resolving instances of competing jurisdiction over transnational crime. The above-listed factors should be considered as criteria for determining the “centre of gravity” or the most convenient forum for prosecution of money laundering offences.

In practice, whatever factors are ultimately employed to justify the States’ interests in the prosecution, negotiation and cooperation between the States involved is essential for evaluating and balancing those factors, then to reach a decision where to prosecute. The requirement of consultation and coordination is also provided for in the suppression conventions.<sup>77</sup> The relevant State authorities should also consult with each other about the substance and procedure of prosecution, such as the application of any procedural defences or the allocation of cases.

### *Concurrent jurisdiction over transnational money laundering*

In the case of transnational money laundering, the potential for concurrent jurisdiction claims will be the norm. Let us assume that Mr X who is a national of State A has participated in the transnational money laundering offence involving conduct in State B and State C. He travels to State B to commit an act of money laundering. In State B, he deposits illegal funds in banks (placement), and then he transfers these funds through accounts at various banks or by using shell corporations in State B (layering). Finally, the funds are transferred and integrated in State C, for example, by investing them in real estate, luxury assets or business ventures (integration). The fund transactions are mainly carried out by internet banking. It appears that States A, B and C each have jurisdiction over the “same” conduct of “transferring illegal fund knowing that such fund is the proceeds of crime” which results in the “same” money laundering offence. States B and C may each establish jurisdiction to adjudicate over Mr X for the “same” money laundering offence upon the subjective territoriality principle. In addition, State A may impose jurisdiction to adjudicate

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is most interested and affected by the outcome of the case (see Hugh S. McManus, “Conflict of Laws: The Center of Gravity Theory Applied to Torts: *Babcock v. Jackson*” (1963) 47 *Marquette Law Review* 255 at 255-256).

<sup>76</sup> The doctrine of *forum non conveniens* (i.e. some other forum is more “appropriate”) is a familiar and developed concept in the conflict of law used to determine the appropriate forum for legal proceedings in civil cases, when concurrent jurisdiction exists. This doctrine was developed by the Scottish courts; then, adopted by the US, and recently by England (see Lawrence Collins (with specialist editors) (ed) *Dicey and Morris on the Conflict of Laws* (Sweet & Maxwell Limited, 1993) at 398-400; and the leading case *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] A.C.460). In general, when determining whether or not to exercise *forum non conveniens*, courts consider several factors, including: the residence of the parties, the location of evidence and witnesses, public policy, the relative burdens on the court systems, the plaintiff’s choice of forum, and how changing the forum would affect each party’s case.

<sup>77</sup> *Palermo Convention*, above n4, article 15(5); and *UNCAC*, above n14, article 42(5).

on Mr X based upon the principle of nationality. In this hypothetical case, there is a potential concurrent jurisdiction which can be a negative or positive concurrence. Negative concurrent jurisdiction is the situation, in which no State claims jurisdiction over the offender or offence. Positive concurrent jurisdiction happens when more than one State claims jurisdiction over the same offender or offence. The case of positive jurisdictional concurrence, in which State A, B and C each seeks to prosecute Mr X for the “same” offence upon the principle of territoriality or nationality, will be discussed hereinafter.

In practice, Mr X should not be prosecuted for the “same” offence sequentially by different States. Thus, the principle of *ne bis in idem* should be applied to this transnational context. It is also necessary to address the issue of prioritizing the claims of competing jurisdiction over the same money laundering offender or offence. More specifically, how and which factors should be considered to determine the most appropriate State for prosecution? In this case, subject to the UN’s suggestion,<sup>78</sup> custody of the offender and nationality of the offender can be factors that are in favour of awarding jurisdictional priority. Assuming that Mr X is apprehended in State C; logically, on the basis that there is evidence indicating he has committed money laundering in State C, State C should be given the first opportunity to prosecute Mr X. If other States are satisfied with the outcome of prosecution conducted by State C, they should not pursue their own prosecutions. But what if Mr X travels to State C, commits the money laundering offence, and then returns to State A? In such a situation, both State A and State C have jurisdiction over the conduct in question and can prosecute Mr X. Both State A and C may want to prosecute Mr X. Under the *aut dedere aut judicare* principle, State A shall either extradite Mr X to State C for prosecution or prosecute him himself. Traditionally, Mr X’s nationality weighs heavily in favour of granting prosecution to State A. Another significant factor which should be taken into account is the place of prosecution of the predicate offence. The State which prosecutes both the money laundering offence and its predicate offence may arguably have a weightier claim to go first. In the situation where a State with a weaker legal basis has invested more resources into the investigation and has greater capacity, such State may have a better claim.

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<sup>78</sup> United Nations, above n74.

## **5.4 Interim Conclusion**

In brief, in practice, the principle of subjective territoriality is the predominant principle for the assertion of jurisdiction over transnational money laundering. This principle is given priority over other bases, such as the objective territoriality, “intended effects”, nationality and *aut dedere aut judicare* principles. While the application of the subjective territoriality principle is often mandatory, the application of other principles is optional, limited or discretionary.

The nature of transnational money laundering offences potentially leads to problems of concurrent jurisdiction over the “same” money laundering offence. The priority of a jurisdictional claim depends on the combination of convincing grounds in particular cases. In some circumstances, a State which combines territorial jurisdiction with custody of the offenders should have the better claim. In others, the combination of nationality principle and custody of offender should have the priority. In addition, in some cases, the State where the predicate crime was committed or prosecuted should be favoured. However, in general, States traditionally first proceed with consultation and negotiation in dealing with instances of jurisdictional concurrence.

## **5.5 Criminal Jurisdiction under Vietnamese Laws and its Application to Transnational Money Laundering**

The main purposes of this section are to examine the general criminal jurisdiction principles of Vietnam over transnational crime and how they can be applied to transnational money laundering. Because there has not yet been a recorded case of transnational money laundering over which Vietnam has asserted its criminal jurisdiction, the jurisdictional application and suggestions are limited to the “law in the books”. The section begins with a snapshot of how Vietnamese competent authorities exercise their jurisdiction (enforcement and adjudicative jurisdiction) over an ordinary territorial criminal case.<sup>79</sup>

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<sup>79</sup> A particular aspect of the enforcement jurisdiction - confiscation of the criminal proceeds, is examined in chapter 6.

### 5.5.1 Ordinary Criminal Jurisdiction

The Penal Code provides for jurisdiction over all crimes, including money laundering, committed within the territory of Vietnam.<sup>80</sup> The ordinary enforcement and adjudicative jurisdiction over a purely territorial criminal case are reflected mainly in the criminal proceedings against such criminal case, which are provided for in the law of criminal procedure. The sources of contemporary Vietnamese criminal procedure consist primarily of the Criminal Procedure Code,<sup>81</sup> its legal interpretation, and the Ordinance on Criminal Investigation.<sup>82</sup> Contemporary Vietnamese criminal procedure shares many characteristics of Russian criminal procedure<sup>83</sup> and the criminal procedures of continental legal countries (e.g., France or Germany).<sup>84</sup> It takes an inquisitorial approach and is dominated by a formal pre-trial investigation.

There are four basic stages in the criminal proceedings of a territorial criminal case in Vietnam. Further issues may arise when, for example, the crime is transnational.<sup>85</sup> The first stage is “initiation of a criminal case” based on suspicion of any crime committed by anybody. A criminal case is usually initiated by the investigative bodies,<sup>86</sup> or sometimes by the People’s Court or People’s Procuracy based on certain grounds.<sup>87</sup> This stage normally works as follows. As soon as the competent investigative body obtains knowledge of a suspected crime, it is obliged to commence a “preliminary investigation” to decide whether there is evidence indicative of the potential crime. Within no more than two months, the investigative body must decide whether to formally initiate a criminal case. A criminal case

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<sup>80</sup> Bo Luat Hinh Su [*Penal Code*] (Vietnam) Law No. 15/1999/QH10, 21 December 1999, entered into force 1 July 2000 article 5(1).

<sup>81</sup> Bo Luat To Tung Hinh Su [*Criminal Procedure Code*] (Vietnam) Law No. 19/2003/QH11, 26 November 2003, entered into force 1 July 2004.

<sup>82</sup> Phap Lenh To Chuc Dieu Tra Hinh Su [*Ordinance on Criminal Investigation*] (Vietnam) No. 23/2004/PL-UBTVQH11, 30 August 2004; and its amendments in 2009.

<sup>83</sup> Basic issues of Russian criminal procedure can be referenced in William Burnham and Jeffrey Kahn, “Russia’s Criminal Procedure Code Five Years Out” (2008) 33(1) *Review of Central and East European Law* 1.

<sup>84</sup> Reference for German criminal procedure can be found in Michael Bohlander, *Principles of German Criminal Procedure* (Hart Publishing, 2012).

<sup>85</sup> These issues are usually related to international cooperation in criminal matters, which will be discussed in the following chapters.

<sup>86</sup> Structure and functioning of various investigative bodies are provided for in *Ordinance on Criminal Investigation*, above n82, articles 9-25. There are three groups of investigative bodies which belong to the Ministry of Public Security, the Ministry of Defense and the People’s Procuracy. Investigative bodies in the Ministry of Public Security are the most powerful ones

<sup>87</sup> *Criminal Procedure Code*, above n81, article 100-108.

has to be formally initiated for further investigation when the investigative body discovers sufficient grounds for justifying a high degree of suspicion that the crime may have occurred. The investigative body is obliged to make a formal written decision of initiation of the criminal case. If this decision is made by someone other than procurator, it must be sent to the proper People's Procuracy for approval before coming into effect.<sup>88</sup> The Procuracy will also decide whether Vietnam has jurisdiction over a case with some extraterritorial aspects (e.g., the crime committed by foreigners or transnational crimes). It is noteworthy that the "preliminary investigation" may not relate to a specific person, it may be opened into the circumstances of a crime allegedly committed where no suspect has yet been identified. However, in the preliminary investigation, if the investigative body has sufficient evidence to charge a person with a specific crime, it shall issue a written order charging such person as an accused. This order must also be sent to the People's Procuracy for approval. Thus, the decision to initiate a criminal case and the order charging a person can be made at the same time; but normally the former happens before the latter. The charges are usually laid at the stage of investigation.

At the second stage, the stage of investigation, the criminal investigators (mainly police officials) are appointed to carry out the investigation into the criminal case under the supervision of a prosecutor. In practice, prosecutors have a relatively passive role, the investigators enjoy the dominant role in investigative activities. The investigators compile the investigative case file, start the process of collecting evidence and look for the suspects. When there is sufficient evidence to accuse the suspect, the charge is laid. In the process of investigation, if it is believed that the accused can obstruct the criminal proceedings, or can continue to commit crimes, the competent agencies (normally the police) can impose restraining measures on the accused, for example arrest, holding and detention.<sup>89</sup> The investigative body can search relevant persons and/or premises, and seize anything found that may serve as evidence.<sup>90</sup> The stage of investigation ends with its outcome including the investigative case file which contains evidence and records of the investigative actions (e.g., interrogation of the accused and testimony of witnesses, searches of persons and premises, and seizures of objects or money related to the crime); and a more important product - the

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<sup>88</sup> In many cases, controversies happen between the investigative body and the People's Procuracy when deciding whether to approve the decision, because of the determination of to what extent are sufficient grounds. In addition, whether "evidence" obtained in the preliminary investigation is admissible at trial is arguable. In practice, by many means, the investigative body can make it admissible.

<sup>89</sup> *Criminal Procedure Code*, above n81, article 79.

<sup>90</sup> *Ibid*, articles 140-149.

investigative conclusion report. If there is sufficient evidence to prove that the accused has committed the crime, the investigative conclusion report will propose the prosecution of the accused.

Investigation is followed by the prosecution stage. Once the investigation is completed and the investigative conclusion report is issued, the case file and the report must be conveyed to the People's Procuracy. Depending on its evaluation of the evidence, the People's Procuracy then decides on one of three outcomes:<sup>91</sup> i) prosecuting the accused before court by an indictment following the proposal of the investigative body; ii) returning the case file to the investigative body for further investigation; or iii) ceasing or suspending the criminal proceedings. If the decision to prosecute is made, the People's Procuracy shall file the indictment and send it enclosed with the complete case file to the trial court.

The final stage is trial. After receiving the case file including the indictment, the judges assigned to preside over the court sessions must examine the case file and settle other duties for the trial.<sup>92</sup> Then, the judges shall make one of the following decisions: i) to bring the case to trial; ii) to return the case file for further investigation; or iii) to cease or suspend the criminal proceedings. If the judges decide to bring the case for trial, the trial court shall prepare the hearings. The trial proceedings at first instance are quite similar to an adult trial at first instance in Germany.<sup>93</sup> The standard court at first instance constitutes a judge and two "people's assessors" ("*hoi tham nhan dan*").<sup>94</sup> In serious and complicated cases, it constitutes two judges and three assessors. The trial ends when the judgement is pronounced. The judgement shall decide whether the defendants are guilty, the punishment on convicted person, and other judicial measures.<sup>95</sup> Relevant civil matters (e.g., compensation for the victim) can be settled through the bringing of a civil suit collateral to criminal proceedings (at the trial stage), but not through separate civil proceedings.

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<sup>91</sup> Ibid, article 168(1).

<sup>92</sup> Ibid, article 176.

<sup>93</sup> See "Simplified outline of an adult trial at first instance in Germany" in Bohlander, above n84, 117-118. General features of Vietnamese courts, evidence, defence counsel and trial, appeal and penalties can be found in Pip Nicholson and Kieu Truong, "Drugs Prosecutions in Vietnam: The Modern Propaganda Trial" (2008) 34(2) Monash University Law Review 430.

<sup>94</sup> People's assessors are not the same as typical jurors in courts of common law States. Although they are vested with independent and equal right to judges in making the decision at trial, their effect is extremely limited in practice.

<sup>95</sup> *Criminal Procedure Code*, above n81, article 199(1)

### 5.5.2 Criminal Jurisdiction over Transnational Crime

#### *Concept of transnational crime in Vietnamese legislation*

It should be noted that the general concept of transnational crime has not yet been provided for in any formal legal documents by Vietnam, although Vietnam has ratified the Palermo Convention. Nonetheless, the Vietnamese equivalent term (“*toi pham xuyen quoc gia*”) is used widely by both the authorities and the public and most categories of transnational crime have been provided for in the Penal Code.<sup>96</sup> Besides there are specific laws against drug-related crimes,<sup>97</sup> corruption,<sup>98</sup> human trafficking<sup>99</sup> and money laundering.<sup>100</sup> In practice, transnational crime is popularly referred to as cross-border crime.

#### *Legal provisions of criminal jurisdiction*

The general principles of criminal jurisdiction of Vietnam are provided for in articles 5 and 6 of the Penal Code<sup>101</sup> as follows:

##### *Article 5: The effect of the Penal Code on crimes committed on the territory of the Socialist Republic of Vietnam*

1. The Penal Code shall apply to all crimes committed on the territory of the Socialist Republic of Vietnam.
2. The criminal liability of foreigners who commit crimes on the territory of the Socialist Republic of Vietnam but are entitled to diplomatic immunities or consular privileges and immunities under Vietnamese laws, under international treaties which the Socialist Republic of Vietnam has signed or acceded to, or under international custom, shall be addressed by the diplomatic channels.

##### *Article 6: The effect of the Penal Code on crimes committed outside the territory of the Socialist Republic of Vietnam*

1. Vietnamese citizens who commit crimes outside the territory of the Socialist Republic of Vietnam may be examined for criminal liability in Vietnam according to this Code.

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<sup>96</sup> See chapter 2, section 2.3.1.

<sup>97</sup> Luật Phòng, Chống Ma túy [Law on Prevention and Suppression of Narcotics] (Vietnam) Law No. 23/2000/QH10, 9 December 2000, entered into force 1 June 2001.

<sup>98</sup> Luật Phòng, Chống Tham Nhũng [Law on Prevention and Suppression of Corruption] (Vietnam) Law No. 55/2005/QH11, 29 November 2005, entered into force 1 June 2006.

<sup>99</sup> Luật Phòng, Chống Buôn Bán Người [The Law on Prevention and Suppression of Human Trafficking] (Vietnam) Law No. 66/2011/QH12, 29 March 2011, entered into force 1 January 2012

<sup>100</sup> Luật Phòng, Chống Rửa Tiền [Law on Prevention and Suppression of Money Laundering] (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013

<sup>101</sup> Penal Code, above n80.



This provision shall also apply to stateless persons who permanently reside in the Socialist Republic of Vietnam.

2. Foreigners who commit crimes outside the territory of the Socialist Republic of Vietnam may be examined for criminal liability according to the Penal Code of Vietnam in circumstances provided for in the international treaties which the Socialist Republic of Vietnam has signed or acceded to.

It should be noted that these articles have been unchanged since they were provided for in the first Vietnam's Penal Code in 1985. In addition, Vietnam has not introduced any formal legal interpretation of the articles, even after the ratification of the 1988 Vienna Convention, the UNCAC and the Palermo Convention in 1997, 2009 and 2012.

### *Subjective territoriality jurisdiction*

It can be seen that, similarly to most States, Vietnam establishes its jurisdiction over all crimes committed on its territory. Although the Vietnamese criminal law does not formally provide any specific principle for determining when a crime is considered as having been committed on the territory of Vietnam, it is assumed that the principle of subjective territoriality is applied predominantly.<sup>102</sup> Subjective territoriality has been applied firmly to numerous transnational drug trafficking cases. A number of foreign nationals who committed the crime of cross-border trade or transportation of narcotics between Vietnam and foreign countries were prosecuted, convicted and sentenced severely (even subject to the death penalty) in Vietnam.<sup>103</sup> All of these accused were apprehended in the territory of Vietnam at the time the crime was committed.

If at least one of the acts proscribed in article 250 or the amended article 251 of the 1999 Penal Code occurs on the territory of Vietnam, Vietnam has jurisdiction over it. As Vietnam takes the "collective approach", all the acts the perpetrator carries out can constitute only one of two offences under article 250 or amended article 251.

### *"Quasi-territoriality" jurisdiction*

The principle of "quasi- territoriality" jurisdiction is not mentioned in any formal legal documents, although Vietnam customarily exercises its jurisdiction over crimes committed on its flag-vessels or registered aircraft.

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<sup>102</sup> Pham Van Beo, *Luat Hinh Su Viet Nam - Phan Chung (Sach Tham Khao)* (Nha Xuat Ban Chinh Tri Quoc Gia, 2009) at 101-102.

<sup>103</sup> Pip Nicholson and Kieu Truong, "Drugs Prosecutions in Vietnam: The Modern Propaganda Trial" (2008) 34(27) Monash University Law Review 430 at 448.

Article 12(3) of the Maritime Code of Vietnam (2005) states that only vessels which have Vietnamese nationality can fly the Vietnamese flag.<sup>104</sup> Vessels registered abroad are not allowed to fly the flag of Vietnam, unless the other registration has been temporarily terminated or eliminated.<sup>105</sup> Hence, vessels flying the Vietnamese flag have only one nationality that is Vietnamese nationality. In a same vein, article 13(2) of the Law on Civil Aviation of Vietnam allows aircrafts to be registered as of Vietnamese nationality if, at the time of registering, they have not yet been registered elsewhere or their previous registrations have been terminated.<sup>106</sup> These provisions prevent the potential for competing criminal jurisdiction over crimes committed on Vietnamese flag-vessels or on its registered aircraft.

### *Nationality jurisdiction*

Nationality jurisdiction is optional for the establishment of extraterritorial criminal jurisdiction under article 6(1) of the Penal Code. This provision corresponds to the standards provided for in the suppression conventions. In practice, Vietnam has exercised this jurisdiction in a number of cases.<sup>107</sup> It is assumed that nationality jurisdiction can be applied to transnational money laundering crimes committed abroad by Vietnamese nationals and may prove to be a useful tool in this regard. As Vietnam accepts dual nationality,<sup>108</sup> concurrent national jurisdiction is possible.

### *Objective territoriality jurisdiction and the aut dedere aut judicare principle*

It can be seen that the article 6(2) of the 1999 Penal Code is very broad and it does not spell out the substance of any jurisdictional principle. This provision appears to be designed to cover other possible forms of jurisdiction, such as objective territoriality, “subsidiary” universality and universality jurisdiction. The general perception is that Vietnam may exercise these jurisdictions “in circumstances provided for in the international treaties”. These circumstances have not been specified in any sub-laws, so it is not clear in which exact circumstances the provision is to be applied. This vagueness is, of course, a hindrance to the implementation of article 6(2). Nevertheless, as Vietnam is a Party to the 1988 Vienna

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<sup>104</sup> Bo Luật Hàng Hải Việt Nam [*Maritime Code of Vietnam*] (Vietnam) Law No. 40/2005/QH11, 14 June 2005, entered into force 01 January 2006.

<sup>105</sup> Ibid, article 14(1)(b).

<sup>106</sup> Luật Hàng Không Dân Dụng Việt Nam [*Law on Civil Aviation of Vietnam*] (Vietnam) Law No. 66/2006/QH11, 29 June 2006, entered into force 01 January 2007.

<sup>107</sup> Information supplied by the Interpol Vietnam (on file with the author).

<sup>108</sup> Luật Quốc Tịch Việt Nam [*Law on Nationality of Vietnam*] (Vietnam) Law No. 24/2008/QH12, 13 November 2008, entered into force 01 July 2009, article 5.

Convention, the Palermo Convention and the UNCA, Vietnam can assert objective territoriality jurisdiction over some acts which fall under the fourth type of conduct of money laundering offences (participation in, association with and so on),<sup>109</sup> excluding conspiracy (Vietnam does not criminalize conspiracy). Similarly, Vietnam can apply the *aut dedere aut judicare* principle to the offences criminalized by those Conventions, including money laundering offences, although its law is silent on this principle.<sup>110</sup>

#### *Double criminality condition*

Article 6 does not suggest that Vietnam expressly applied double criminality to exercising extraterritorial jurisdiction. Instead, it provides that the application of double criminality relies heavily on international treaties to which Vietnam is a Party. Since the suppression conventions oblige their State Parties to criminalize money laundering, so other State Parties will in fact have criminalized money laundering and the requirement of double criminality will be met.

Vietnam's law does not state clearly whether the predicate crimes for money laundering include crimes committed abroad. This inadequacy may preclude Vietnam from claiming jurisdiction over a money laundering activity which occurred in Vietnam, but its predicate crime was committed outside Vietnam and double criminality of the predicate crime is required.

#### *Ne bis in idem*

Vietnam became a Party the International Covenant on Civil and Political Rights in 1982. In 2003, the principle of *ne bis in idem* was first incorporated into article 107(4) of Vietnam's Criminal Procedure Code, which provides that criminal proceedings shall be not instituted against a person for the offence for which he has already been subject to a legally valid judgment or a decision to cease his case.<sup>111</sup> The principle is restated in article 31(4) of the Constitution of Vietnam as follows "no one shall be punished twice for the same crime".<sup>112</sup> These provisions reflect Vietnam's strong commitment to protecting human rights and civil rights of defendants in criminal proceedings.

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<sup>109</sup> The types of conduct of money laundering offences were illustrated in chapter 4.

<sup>110</sup> Chapter 8 will discuss details of extradition.

<sup>111</sup> *Criminal Procedure Code*, above n81.

<sup>112</sup> Hien Phap Nuoc Cong Hoa Xa Hoi Chu Nghia Viet Nam [*Constitution of Socialist Republic of Vietnam*] (Hanoi) 28 November 2013.

How Vietnam applies this principle in a transnational context will be examined in chapters 7 and 8.

#### *Dealing with jurisdictional concurrence*

Vietnam has not provided explicit guidance on resolving concurrence of criminal jurisdiction. There is only one relevant provision that is article 345(1) of the Criminal Procedure Code, which reads as follows:

For cases involving foreigners who have committed crimes on the territory of the Socialist Republic of Vietnam, if the criminal proceedings cannot be conducted because such persons have left the country, the competent agencies authorized conducting the criminal proceedings may send the case files to the Supreme People's Procuracy in order to carry out the procedures for transferring them to the corresponding foreign authorities.

Although this article provides for a simple procedure of transfer of proceedings against foreigners to foreign jurisdictions where the accused has left Vietnam is found, it can be used to address jurisdictional concurrence. For example, X, after committing a transnational money laundering offence in Vietnam which was involved in State A, fled to State A. Vietnam certainly can assert its jurisdiction and file the case and State A may also do. According to article 345(1) of the Vietnamese Criminal Procedure Code, Vietnam may transfer the case file to State A for the proceedings against X.

#### **5.5.3      *Comments and Suggestions***

We can see that Vietnam has not transformed the general jurisdictional principles provided for in the suppression conventions into its criminal law. The legal provisions of jurisdictional principles of Vietnam remains unchanged under the diffusion of the international AMLSs. Vietnam can interpret broadly the existing legal provisions and rely on them to establish its extraterritorial jurisdiction over transnational money laundering. Nevertheless, the lack of formal legal provisions, such as the rules for localizing the conduct of transnational crime and the rules for establishing the “quasi- territoriality” jurisdiction, will disadvantage Vietnam's authorities when dealing with transnational money laundering, especially in competing for jurisdiction over such crime. These inadequacies and the vagueness of article 6 of the Penal Code may lead to the authorities having a lack of confidence when using them. It also may

lead to successful challenges by the defendants, particularly by defendants who are resident abroad on view that Vietnam does not have clear jurisdictional principles over extraterritorial offences.

An adequate legal framework for jurisdiction is necessary to guarantee the legitimacy of jurisdictional claims. In addition, Vietnam is a Party to the suppression conventions. Thus, Vietnam needs to remedy the shortcomings in articles 5 and 6 of the Penal Code by providing much greater detail about the principles of criminal jurisdiction that it applies in order to meet its international obligations under these conventions. The provisions of criminal jurisdiction in the French Penal Code and the German Criminal Code provide useful reference points for Vietnam in this regard.<sup>113</sup> Article 113-2 of the French Penal Code (1994) reads that “an offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory”. The French courts have construed “constituent elements” expansively to include: preparatory acts, “preliminary condition” necessary for the commission of the offence, and the effects.<sup>114</sup> Articles 113-3 and 113-4 provide “quasi- territoriality” jurisdiction. Articles from 113-6 to 113-12 stipulate French jurisdiction over offences committed outside France. Vietnam should adopt this kind of specific language into its law. In addition, Vietnam should extend the coverage of the predicate crimes for money laundering to include certain crimes committed overseas. Section 261(8) of the German Criminal Code states that objects which are proceeds from a predicate offence committed abroad are equal to those derived from a predicate offence in Germany if the offence is also punishable at the country where it occurred. Therefore, conduct that occurs abroad can constitute a predicate offense for money laundering under German law, provided that double criminality is met. Vietnam should introduce a similar provision into its law in order to maintain legality at a transnational level.

The legitimacy of a criminal jurisdiction claim is fundamental, but is insufficient for success in exercising extraterritorial jurisdiction. The capacity of law enforcement agencies and reciprocity are other additional crucial requirements. The willingness of Vietnam’s law enforcement authorities to exercise extraterritorial jurisdiction depends on their capacity, their interests in competing with other jurisdictions and the cooperation of their foreign counterparts. Prosecution of extraterritorial crimes usually requires significant resources, and would be very challenging for Vietnam in the absence of the willingness to cooperate of the

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<sup>113</sup> Although the criminal jurisdiction provisions in the criminal laws of Russia are more detailed than that of Vietnam, the vagueness still remains.

<sup>114</sup> Ryngaert, above n51, at 198.

other countries affected. Countries often cautiously weigh the costs, the difficulties and the interests in competing extraterritorial jurisdiction over a transnational crime. Vietnam's authorities appear hesitant to claim and execute extraterritorial jurisdiction, especially in case of transnational money laundering, because of lack of both the legal basis and resources.<sup>115</sup> However, Vietnam should be ready for the circumstances of competing criminal jurisdiction over transnational money laundering. Vietnam needs to work out a policy to decide when it will claim jurisdiction in a situation of competing extraterritorial jurisdiction, particularly over money laundering that has taken place outside Vietnam. The "centre of gravity" approach to making that decision could be used effectively by Vietnam. Vietnam should take the list of factors that the UN set out in its report on economic fraud as a guide in this regard. For example, if it has suffered the "greatest direct or indirect harm" through a case of money laundering, then arguably there is a great "social danger" which suggests that, adhering to its own principles of material criminality, it should take jurisdiction and enforce that jurisdiction. This may be the case even when other competing States have much greater investigative capacity but are not harmed to the same extent.

## 5.6 Conclusion

The establishment by States of adequate criminal jurisdiction over transnational money laundering is fundamental to many aspects of the international response to money laundering. In order to avoid controversial unilateral assertion of jurisdiction, States have agreed on a number of reasonable principles on which to establish their extraterritorial jurisdiction over the money laundering offence. By adopting the AML-related conventions, State Parties have been provided with both mandatory and optional principles for asserting jurisdiction over transnational money laundering offences. The principles of territoriality, nationality and *aut dedere aut judicare* are the best possible bases for the establishment of extraterritorial jurisdiction over money laundering offences. Due to some weaknesses of the nationality and *aut dedere aut judicare* principle, such as the problems of dual nationality or nationality of corporations, the principle of subjective territoriality enjoys the predominant role. States often apply these jurisdictional principles in combination rather than alone. In addition, the assertion of extraterritorial jurisdiction over money laundering offences should take account of double criminality of the predicate offences and the *ne bis in idem* principle. When

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<sup>115</sup> Relevant AML authorities and their capacity were sketched in chapter 3.

jurisdictional concurrence occurs, the involved countries should consult one another taking into account of a number of relevant factors and take the “centre of gravity” approach to deciding which State or forum eventually prosecutes.

States less able to establish jurisdiction over money laundering are often those which have a weak legal basis and/or insufficient resources. Vietnam is one of these. Vietnam can utilize the existing jurisdictional provisions as the legal bases for claiming jurisdiction over transnational money laundering. However, in order to succeed in establishing jurisdiction, Vietnam should first and foremost provide: i) detailed rules for determining when a crime is considered to be committed in the territory of Vietnam; ii) clear guidance on how to localize the conduct of transnational money laundering offences; iii) “quasi- territoriality” jurisdiction; iv) guidance on the specific circumstances for asserting jurisdiction over Vietnamese citizens or foreigners who have allegedly committed crimes abroad; iv) extended coverage of the predicate crimes including the crimes committed outside Vietnam; and v) how Vietnam exercises its own criminal jurisdiction over transnational crime if it refuses to extradite on the ground of territoriality or nationality. By providing these, Vietnam can implement adequately the international AMLSs on extraterritorial jurisdiction. However, this thesis argues that this just constitutes compliant implementation on paper; the implementation in practice will be still limited due to insufficient resources.

## Chapter 6

### CONFISCATION OF CRIMINAL ASSETS

#### **6.1 Introduction**

#### **6.2 General Concepts**

##### *6.2.1 The Concept of Provisional Measures*

##### *6.2.2 The Concepts of Forfeiture and Confiscation*

##### *6.2.3 “Property Confiscation” and “Value Confiscation”*

#### **6.3 International Standards on Procedures for Confiscation of Criminal Assets and Variations in National Implementation**

##### *6.3.1 Conviction-based Confiscation*

##### *6.3.2 Non-conviction based Confiscation*

##### *6.3.3 Variations in National Confiscation Legislation*

#### **6.4 Interim Conclusion**

#### **6.5 Vietnamese Legislation on Confiscation of Criminal Assets**

##### *6.5.1 Relevant Concepts and Terminologies*

##### *6.5.2 Provisional Measures*

##### *6.5.3 Confiscation*

##### *6.5.4 Criticism and Suggestions*

#### **6.6 Conclusion**

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#### **6.1 Introduction**

Since the 1990s, it has been argued that the traditional responses to crimes, which focus on the punishment of offenders, such as imprisonment and fines, are insufficient for combating crimes generating huge proceeds (e.g., drug trafficking).<sup>116</sup> Measures for the retrieval of criminal assets which entail the tracing, freezing or seizure and confiscation of criminal proceeds and instrumentalities have been developed as supplementary tools to international law and national law against these crimes. It is argued that the attack on proceeds and instrumentalities of crime will: i) deprive criminals of their illegal proceeds, thus reducing the motive of crime; and ii) eliminate the essential resources for committing future crimes,

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<sup>116</sup> Hans-Jorg Albrecht, “Money Trail, Developments in Criminal Law, and Research Needs: An Introduction” (1997) 5(3) *European Journal of Crime, Criminal Law and Criminal Justice* 193 at 193.



including money laundering, and prevent criminals from infiltrating and corrupting the legitimate economy.<sup>117</sup> In addition, confiscation is an effective means for recovering property that may be used to compensate the innocent victims of crime,<sup>118</sup> and can make law enforcement pay for itself.<sup>119</sup> Furthermore, the proceeds-following measures can provide a wide range of benefits for investigating bodies. For instance, tracing the money trail enables investigators to gather further information and evidence about the identification, financial background or property of suspects and criminals.<sup>120</sup> As a result, provisional measures and confiscation of criminal assets have become indispensable components of the international AMLs.

Provisional measures and confiscation of criminal assets were first initiated internationally in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention),<sup>121</sup> which concerns only drug-related crimes. Since then, they have been emphasized in the United Nations Convention against Transnational Organised Crime (Palermo Convention),<sup>122</sup> the United Convention against Corruption (UNCAC)<sup>123</sup> and the FATF Recommendations.<sup>124</sup> These conventions and recommendations call for State Parties and member countries to adopt the necessary measures to enable the identification, tracing, freezing or seizure and eventually the confiscation of the criminal proceeds of various crimes.

This chapter will first conceptualize “provisional measures”, “confiscation” and “forfeiture” as parts of national criminal jurisdiction (enforcement jurisdiction). It will then discuss the obligations and rules on confiscation of criminal assets, including the assets

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<sup>117</sup> R. T. Naylor, “Wash-out: A Critique of Follow-the-Money Methods in Crime Control Policy” (1999) 32(1) *Crime, Law and Social Change* at 11-13.

<sup>118</sup> Simon N. M. Young, *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing Limited 2009) at 31.

<sup>119</sup> For example, in the US, see Ethan A. Nadelmann, “Unlaundering Dirty Money abroad: US Foreign Policy and Financial Secrecy Jurisdictions” (1986) 18(1) *Inter-American Law Review* 33 at 34.

<sup>120</sup> Michael Kilchling, “Tracing, Seizing and Confiscating Proceeds from Corruption (and other Illegal Conduct) Within or Outside the Criminal Justice System” (2001) 9(4) *European Journal of Crime, Criminal Law and Criminal Justice* 264 at 265.

<sup>121</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990, article 5.

<sup>122</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003, article 12.

<sup>123</sup> *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005, article 31.

<sup>124</sup> FATF (2012), “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations”, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 22 May 2014), Recommendation 4 (R4).

involved in money laundering, provided for in international legal instruments and in the laws of some States. Last, but not least, the chapter will assess the compliance of Vietnamese confiscation legislation with the international standards and make suggestions for law reform.

## **6.2 General Concepts**

### **6.2.1 *The Concept of Provisional Measures***

Identifying, tracing, freezing or seizing the criminal proceeds or instrumentalities, known as “provisional measures”, aim at locating and preserving criminal assets for the eventual purposes of being able to execute a confiscation or forfeiture order. Freezing or seizure of the proceeds or alleged proceeds of crimes being investigated ensures that this property is not laundered or disposed of. Whilst freezing usually applies to intangible property (e.g., freezing money held in bank account), seizure applies to tangible property (e.g., seizure of cash, cars or houses). It should be noted that freezing or seizure, as a provisional measure for confiscation or forfeiture orders, is distinguishable from the traditional concept of seizure as an investigative measure used to preserve elements of proof. The suppression conventions define freezing or seizure as “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or a competent authority”.<sup>125</sup> Article 12(2) of the Palermo Convention provides that “States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation”.

The definition of “tracing” is not provided for in the suppression conventions. It seems that the meaning of “tracing”, as a provisional measure in the context of criminal law, is similar in some ways to the civil law (in the sense of private law) concept of “tracing”. In the civil law, “tracing”, which was first employed by English courts sitting in equity hundreds of years ago, is a well-established doctrine in English common law. “Tracing”, or “common law tracing”, is originally referred to as a tool used primarily in equitable claims.<sup>126</sup> It indicates a set of rules for identifying property to which, or to a share in or a charge over which, a claim

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<sup>125</sup> 1988 Vienna Convention, above n121, article 1(l); Palermo Convention, above n122, article 2(f).

<sup>126</sup> Bernd H. Klose, *ASSET TRACING & RECOVERY - The FraudNet World Compendium* (Gebundene Ausgabe, 2009) at 135.

is made.<sup>127</sup> In this context, “property” is used in the following broad senses: i) to describe a physical object which belongs to you, or which you have the right to possess – often called tangible or corporeal property; ii) your legal rights in a physical thing to possess or use or control or benefit from that thing; iii) legal right or rights that a person do something, or refrain from doing something (e.g., copyright) - known as intangible or incorporeal property.<sup>128</sup> The concept of “tracing” is continually evolving in the modern legal system as a relevant legal concept applied widely. In the criminal law context, normally most States provide their enforcement law agencies with the power to identify, trace, and locate criminal assets in the investigative stage.

### 6.2.2 *The Concepts of Forfeiture and Confiscation*

It is necessary to differentiate between “confiscation” and “forfeiture”, which are sometimes used interchangeably and are thus somewhat confusing, by exploring their evolution in English law and in US law. Among common law States, the UK and the US are the forerunners in developing legislation on confiscation and forfeiture. In English law, “forfeiture”, known as “object confiscation”, is an age-old term denoting the removal of the objects and *impedimenta* of crime or of instrumentalities used or intended for use in the commission of the crime. “These are things with which, or in which, or by possession of which, crime is committed”.<sup>129</sup> Some of these things can be forfeited without a conviction,<sup>130</sup> others require conviction.<sup>131</sup> The limitation on forfeiture in English law is the inability to forfeit the whole of criminal proceeds (normally beyond criminal profit) once transformed or hidden in other types of property.<sup>132</sup> Thus, confiscation of the proceeds of crime was introduced in 1986 to remedy the deficiencies of forfeiture, with the principal aims of

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<sup>127</sup> Peter Birks (ed) *Laundering and Tracing* (Clarendon Press, 1995) at 31.

<sup>128</sup> Ibid, at 33-34.

<sup>129</sup> Peter Alldridge, *Money Laundering Law Forfeiture, Confiscation, Civil Recovery, Criminal Laundering, and Taxation of the Proceeds of Crime* (Hart Publishing, 2003) at 59.

<sup>130</sup> For example, under Forgery and Counterfeiting Act 1981, s7(3), anything used or intended for use in making of any false instrument can be forfeited by magistrates without a conviction.

<sup>131</sup> The general forfeiture provision upon conviction is provided for in Powers of Criminal Courts (Sentencing) Act 2000, s143.

<sup>132</sup> The limitation was revealed in *R v Cuthbertson*, where the House of Lords held that section 27 of the Misuse of Drugs Act 1971 did not empower the court to strip professional drug-traffickers of the whole of their ill-gotten gains. And “anything”, in the context of section 27 (1), is any tangible thing. See *R v Cuthbertson* [1981] AC 470, 479-480.

preventing a criminal making profit from crime and of recovering the criminal revenue.<sup>133</sup> By contrast, in US legislation, “forfeiture” has a much wider coverage, including models of the UK forfeiture and the UK confiscation of the proceeds of crime.<sup>134</sup>

Many countries have followed the US provision of forfeiture or the UK legislation on confiscation. In some national legal systems, “confiscation” and “forfeiture” can be used interchangeably with a broad coverage. In others, “forfeiture” mainly relates to the instrumentalities of crime, and “confiscation” normally applies to the proceeds of crime. Nonetheless, in most States, forfeiture is a part of the traditional instruments of criminal law, although the terminology and its focus may be different.<sup>135</sup>

The suppression conventions define “confiscation”, which includes “forfeiture” where applicable, as the permanent deprivation of property by order of a court or other competent authority.<sup>136</sup> Because there is no international consistency in the use of the terms “confiscation” and “forfeiture”, the above definition has been used in many international instruments in order to prevent any dispute regarding terminology from obstructing the application of the provision.<sup>137</sup> Further, this definition is used as the basis of international cooperation for purposes of confiscation. This definition does not reflect a specific legal provision as a stringent binding rule. Rather, it ensures the most efficient and faithful application of confiscation legislation.<sup>138</sup> Apparently, the definition of “confiscation” which

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<sup>133</sup> Confiscation of the proceeds of crime was first introduced in the Drug Trafficking Offences Act 1986. Then, a series of statutes directed to confiscation of the proceeds of crime has been enacted, including: the Criminal Justice Act 1988 (part VI), the Drug Trafficking Act 1994, the Proceeds of Crime (Scotland) Act 1995 and the Proceeds of Crime Act 2002. In *R v May*, the House of Lords noted that: “Although “confiscation” is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it. A criminal caught in possession of criminally-acquired assets will, it is true, suffer their seizure by the State. Where, however, a criminal has benefited financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained”. See *R v May*, [2008] 1 A.C. 1028, 1034. Confiscation of the criminal proceeds in the UK will be described in more detail later in this chapter.

<sup>134</sup> The forfeiture of criminal assets in the US will be described in section 6.3 of this chapter.

<sup>135</sup> Michael Kilchling, “Comparative Perspectives on Forfeiture Legislation in Europe and the United States” (1997) 5(3) *European Journal of Crime, Criminal Law and Criminal Justice* 342 at 343-344.

<sup>136</sup> 1988 *Vienna Convention*, above n121, article 1(f); *Palermo Convention*, above n122, article 2(g).

<sup>137</sup> United Nations (1998), “*Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*” at par. 5.5, available at: [http://www.unodc.org/documents/treaties/organized\\_crime/Drug%20Convention/Commentary\\_on\\_the\\_united\\_nations\\_convention\\_1988\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf) (accessed 28 April 2013).

<sup>138</sup> The Council of Europe (1990), “*Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*” at 6.

includes “forfeiture” where applicable prevents the requested State from refusing cooperation on the ground that its national law only provides for “forfeiture” in the case under question.

Responding to international initiatives calling for the adoption of provisional measures and confiscation “to the greatest extent possible within their domestic legal systems”,<sup>139</sup> the terms “confiscation” and “confiscation of proceeds of crime” have been adopted widely with a more comprehensive scope in national legislation. States have strived to comply with the international standards of provisional measures and confiscation. In most national legislation, confiscation of the criminal proceeds refers to the permanent deprivation, by order of a court or other competent authorities, of any property derived or obtained, directly or indirectly, through the commission of an offence.<sup>140</sup> In order to avoid confusion about wording, hereafter, the term “confiscation” is used in its broadest sense to include what the US calls “forfeiture”.

### **6.2.3 “Property Confiscation” and “Value Confiscation”**

#### *“Property Confiscation”*

The suppression conventions categorize the assets subject to confiscation as follows: i) the proceeds of crime or property the value of which corresponds to such proceeds; and ii) property, equipment or other instrumentalities used in or intended (or destined) for use in offences.<sup>141</sup> The confiscation of these types of asset can be called “property confiscation”.<sup>142</sup>

In the first category, the proceeds of crime includes the property obtained directly through commission of the crime, like the money paid for a consignment of drugs; and the property indirectly derived from an offence, for example, the property purchased with criminal profit. The confiscation of “property the value of which corresponds to such proceeds” can satisfy the claim on confiscation of property legally acquired. It enables confiscation of the property

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<sup>139</sup> See, e.g., article 12(1) of *Palermo Convention*, above n122.

<sup>140</sup> Barbara Vettori, *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (Springer, 2006) at 23.

<sup>141</sup> 1988 *Vienna Convention*, above n121, art 5(1); and *Palermo Convention*, above n122, article 12(1).

<sup>142</sup> It is also known as “object confiscation”. The author prefers to use the term “property confiscation”, because “property” herein is consistent with its definition by the Palermo Convention. This term is also used in UNODC (2012), *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* at 18, available at: [http://www.unodc.org/documents/organized-crime/Publications/Confiscation\\_Manual\\_Ebook\\_E.pdf](http://www.unodc.org/documents/organized-crime/Publications/Confiscation_Manual_Ebook_E.pdf) (accessed 8 July 2013).

with which criminal proceeds have been intermingled, based upon the assessed value of the intermingled proceeds by competent authorities.<sup>143</sup>

In terms of the second category, the term “instrumentalities” is not defined in either the 1988 Vienna Convention or the Palermo Convention. However, article 1(c) of the 1990 Strasbourg Convention defined this term to mean “any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences”.<sup>144</sup> This definition would cover property or equipment used to facilitate or intended for use in the commission of offences.

In a more detailed interpretation related to money laundering offences, the FATF calls for the adoption of measures to enable countries to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.<sup>145</sup> The property laundered is actually included in the coverage of the above-categorized proceeds and instrumentalities.

#### *“Value confiscation”*

Article 12(4) of the Palermo convention stipulates that “[i]f proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds”. In addition, income or other benefits generated from the proceeds of crime shall be also subject to confiscation.<sup>146</sup> This is known as “value confiscation”. This type of confiscation is helpful in circumstances where the criminal proceeds cannot be located, or have been transferred to a third party, or have been removed from the jurisdiction, or have been rendered worthless.<sup>147</sup>

Some countries (e.g., the US, the UK, Germany and France) apply “value confiscation” to their model of conviction-based confiscation.<sup>148</sup> According to this approach, a convicted person is ordered to pay an amount of money equivalent to the value of the benefit he obtained through his criminal conduct. The court, competent authority or jury calculates that

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<sup>143</sup> See *1988 Vienna Convention*, above n121, article 5(6)(b); and *Palermo Convention*, above n122, article 12(3).

<sup>144</sup> *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, 8 November 1990, CETS No. 141, entered into force 1 September 1993.

<sup>145</sup> FATF, above n124, R4.

<sup>146</sup> *Palermo Convention*, above n122, article 12(5).

<sup>147</sup> United Nations, above n137, at 139.

<sup>148</sup> “Value confiscation” in the UK will be examined in detail in the next section of this chapter.

benefit. Article 131-21 of the French Criminal Code, for example, provides *inter alia* that “[w]here the thing confiscated has not been seized or cannot be produced, confiscation in value is imposed. For the recovery of the sum representing the value of the thing confiscated, the provisions governing judicial enforcement of public debts apply”. Section 73a of the German Criminal Code provides that:<sup>149</sup>

To the extent that the confiscation of a particular object is impossible due to the nature of what was obtained or for some other reason or because confiscation of a surrogate object pursuant to section 73(2) 2<sup>nd</sup> sentence has not been ordered, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained. The court shall also make such an order in addition to the confiscation of an object to the extent that its value falls short of the value of what was originally obtained.

One of the common challenges of applying “value confiscation” is to assess the amount of money that represents the benefit derived from a criminal conduct. The practice of the UK illustrated below will show the nature of that challenge.

### **6.3 International Standards on Procedures for Retrieving Criminal Assets and Variations in National Implementation**

This section discusses two dominant models of confiscation provided for in both national legislation (the US and the UK) and the international legal instruments (the suppression conventions and the FATF Recommendations), namely conviction-based confiscation and non-conviction based confiscation. The discussion focuses on the procedure as well as the burden of proof of each model and its variations in the national practice.

#### **6.3.1 Conviction-based Confiscation**

##### *General*

Conviction-based confiscation is the classic model of the confiscation order imposed normally as a part of the sentence directly and personally on the convicted person. It is also known as *in personam* confiscation (confiscation against the person). In some countries, such as the US and the UK, conviction-based confiscation is regulated by specific statutes. In

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<sup>149</sup> “German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*)” (2009), available at: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf) (accessed 12 December 2012).

others, it is generally perceived as a traditional punitive and preventive legal instrument provided for in their criminal laws or criminal procedure laws (e.g., France and Germany<sup>150</sup>).

In most States, an order confiscating criminal assets is a part of the sentencing proceedings against the accused. In addition to sentencing the accused, the sentencing court may order confiscation of the proceeds of the accused's crime or the instrumentalities used or intended for use in the crime. A conviction-based confiscation order is issued following the criminal conviction of the holder of the asset, based upon the proof of a link between that asset and the crime for which the holder was convicted. Regarding the burden of proving that the defendant obtained proceeds from his crime, some countries adopt the criminal standard, others apply the civil standard.<sup>151</sup> It is evident that the criminal standard of such proof will be difficult to satisfy in some cases. A common difficulty will arise when confiscating the proceeds of crimes which have no direct victim or identifying who can supply evidence on the nature of crime and its proceeds. Drug trafficking is an example of an offence which has no direct victim who can be available to identify the profits derived from the criminal conduct.<sup>152</sup> Similarly, in the case of money laundering, there is no direct victim. In a case where a defendant is convicted of self- money laundering, States may wish to strip the defendant of all the proceeds obtained from both his predicate offence and from the money laundering offence for which defendant is immediately convicted. If so, and if the predicate offence is committed abroad without a direct victim, it will often be onerous for the prosecutor (or other competent authorities) to satisfy the criminal standard of proof (if applied) that certain proceeds have been derived from such predicate offence.

States have questioned whether and if so how the standard of proof of a link between the alleged assets subject to confiscation and the crime for which the holder was convicted can be eased. In fact, many States allow a reversal of the burden of proof to the defendants in certain circumstances (e.g., the US and the UK). This is also provided for as an option in article 5(7) of the 1988 Vienna Convention and article 12(7) of the Palermo Convention. In the cases mentioned above, for the purposes of more effective confiscation, the burden of proof may be reversed. It should be stressed that this reversal of the burden of proof is applicable only for the purpose of confiscation, and normally occurs after the conviction. This reversal of the

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<sup>150</sup> See section 43a and 74 of the German Criminal Code. See *ibid.*

<sup>151</sup> FATF (2007), *"Evaluation of Laws and System in FATF Members Dealing with Asset Confiscation and Provisional Measures"* par. 8.

<sup>152</sup> *Ibid.*



burden of proof, however, has raised controversies about a violation of the fundamental aspects of fair trial, namely the presumption of innocence until proven guilty.<sup>153</sup>

*Conviction-based forfeiture (or criminal forfeiture) in the US*

US criminal forfeiture includes both “property forfeiture” and “value forfeiture”. The criminal forfeiture is governed by various statutes, for example title 18 USC § 1963 (criminal forfeiture of assets involved in offences under the Racketeer Influenced and Corrupt Organizations Act (RICO)), 18 USC § 982 (money laundering criminal forfeiture) and 21 USC § 853 (drug offence criminal forfeiture), and Rule 32.2 of the Federal Rules of Criminal Procedure.<sup>154</sup> The general criminal forfeiture process is as follows: i) the prosecutor must give the defendant notice of the government’s intent to forfeit their assets as part of any sentence by including a forfeiture allegation in the indictment;<sup>155</sup> ii) at trial, as soon as the defendant is convicted, the court must determine what assets are subject to forfeiture under the applicable statutes, based on evidence that the government has established the requisite nexus between the assets and the offence.<sup>156</sup> The asset may be in form of money judgement, directly forfeitable property or substitute assets;<sup>157</sup> and iii) once the court finds the assets subject to forfeiture, it must make a preliminary forfeiture order.<sup>158</sup>

Regarding the forfeiture of assets involved in money laundering, title 18 USC § 982(a)(1) states that “the court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property”. It should be noted that while the government's burden of proof in RICO criminal forfeiture is the “beyond a reasonable doubt” standard (criminal standard),<sup>159</sup> the “preponderance” standard (civil standard) governs the forfeiture in case of drug offences (under 21 USC § 853)<sup>160</sup> and money laundering offences (under 18 USC § 982(a)(1)).<sup>161</sup>

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<sup>153</sup> Article 6(2) of the European Convention on Human Rights, 4 November 1950, and article 14(2) of *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, entry into force 23 March 1976, which provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

<sup>154</sup> Federal Rules of Criminal Procedure (the United States), as amended in 1 December 2012.

<sup>155</sup> Ibid, rule 32.2(a).

<sup>156</sup> Ibid, rule 32.2(b)(1)(A).

<sup>157</sup> Ibid, rule 32.2(b)(2)(A). See *U.S. v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) 42.

<sup>158</sup> Ibid.

<sup>159</sup> See *U.S. v. Pelullo*, 14 F.3d 881 (3rd Cir. 1994).

<sup>160</sup> See *U.S. v. Sandini*, 816 F.2d 869 (3rd Cir. 1987).

Section 18 USC § 982(a)(1) provides that the court, in imposing sentence on a person convicted of money laundering offences, shall order that the person forfeit to the US any property, real or personal, involved in such offense, or any property traceable to such property. Under this provision, the government can forfeit the property being laundered, other property that is commingled with it or obtained from the money laundering offence, and other property that facilitates the money laundering offence.<sup>162</sup> Thus, the property subject to forfeiture may include, for example, clean property the defendant used to conceal or disguise laundered funds, such as real property, securities, and luxury items in which he invested the laundered funds to hide them.

### *Conviction-based confiscation in the UK*

Conviction-based confiscation in the UK is provided for in the Proceeds of Crimes Act 2002 (POCA 2002).<sup>163</sup> Accordingly, after a defendant (D) is convicted, the prosecutor asks the court to consider confiscation (or the court believes it is appropriate to do so).<sup>164</sup> The court may then make a confiscation order requiring D to pay a sum of money in addition to any sentence that the court may impose on D. The sum of money represents the benefit obtained through D's criminal conduct. This confiscation order is referred to as "value confiscation" which is distinguished from UK forfeiture categorized as "property confiscation".<sup>165</sup> Before making a confiscation order, the court is required to address three questions:<sup>166</sup> i) whether D has a criminal lifestyle (as explained below this becomes relevant to what can be confiscated);<sup>167</sup> ii) if he has, whether he has benefited from his general

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<sup>161</sup> The term "traceable to" in 18 USC § 982 has been held to mean that "government must prove by preponderance of the evidence that the property it seeks in satisfaction of the amount of criminal forfeiture to which it is entitled has some nexus to the property involved in the money laundering offense". See *U.S. v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996) 1084.

<sup>162</sup> See *U.S. v. Hawkey*, 148 F.3d 920 (8th Cir. 1998) 927.

<sup>163</sup> The POCA 2002 is the comprehensive statute on confiscation of the proceeds of crime in the UK which was previously contained in the Drug Trafficking Act of 1994 (as regards the proceeds of drug trafficking) and in part VI of the Criminal Justice Act of 1988 (as regards the proceeds of indictable offences and certain summary offences).

<sup>164</sup> POCA 2002, s6(3).

<sup>165</sup> Forfeiture in English law is described in 6.2.2 of this chapter.

<sup>166</sup> POCA 2002, s6(4).

<sup>167</sup> See POCA 2002, s75. Section 75(2) of POCA 2002 details the conditions to satisfy a criminal lifestyle. POCA 2002 (Schedules 2 & 4) provides for certain criminal offences which are regarded themselves to be indicative of a criminal lifestyle. These offences include the money laundering offence.

criminal conduct;<sup>168</sup> and iii) if he does not have a criminal lifestyle, then whether he has benefited from his particular criminal conduct.<sup>169</sup> If the court decides that D has benefited from the conduct referred, it must decide the “recoverable amount”,<sup>170</sup> and then make a confiscation order requiring D to pay that amount.<sup>171</sup> The court must answer to the questions and make the decisions based on a “balance of probabilities”.<sup>172</sup> It means that the burden of proof in the process of making a confiscation order is the civil burden.

One of the controversial issues is determining the “recoverable amount”. If the defendant can satisfy the court that the amount available for recovery (“available amount”) is less than the “recoverable amount”, then the court may only make a confiscation order of that lower amount.<sup>173</sup> In addition, according to section 10 of POCA 2002, if the court decides that the defendant has a criminal lifestyle and has benefited from his general criminal conduct, the court is entitled to assume that any expenditure incurred by the defendant over the six years before he was convicted was the property obtained by him through his criminal conduct, unless the defendant can prove the expenditure was not the proceeds of crime.<sup>174</sup> It is noticeable that the assumptions under section 10 of POCA 2002 do not violate article 6(2) of the European Convention on Human Rights, because the confiscation proceedings is not part of sentencing and as such did not involve a criminal charge.<sup>175</sup>

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<sup>168</sup> General criminal conduct is all of the defendant's criminal conduct. It is immaterial whether the conduct occurred before or after the passing of the Act or whether property constituting a benefit was obtained before or after the passing of the Act (POCA 2002, s 76(2)).

<sup>169</sup> Section 76(3) of POCA 2002 sets out the definition of particular criminal conduct.

<sup>170</sup> It is an amount equal to the defendant's benefit from the conduct concerned. See POCA 2002, s7(2).

<sup>171</sup> POCA 2002, s6(5). In *R v May*, the House of Lords noted that there were three questions the court must ask itself and answer: i) has the defendant (D) benefited from the relevant criminal conduct? If the answer to this question is negative, the inquiry ends; otherwise, the second question is: ii) what is the value of the benefit D has so obtained; and iii) what sum is recoverable from D? See *R v May*, [2008] 1 A.C. 1028, 1034.

<sup>172</sup> POCA 2002, s6(7).

<sup>173</sup> See *R. v Comiskey* (1991) 93 Cr. App. R. 227.

<sup>174</sup> In *R v Levin*, the court noted that “there had been a sea change in the conduct of confiscation proceedings, which were now to be viewed through the prism of the amendments. First, the burden of proof was the civil burden. Secondly, the court might make far-reaching assumptions. Thirdly, the court might require the defendant to provide information, and might draw inferences from his failure to do so. Fourthly, the court might rely both on evidence at trial and on any relevant information, properly obtained both before trial and thereafter, in order to determine a defendant's benefit and the amount to be recovered”. See *R v Levin* [2004] 2 Cr. App. R. (S) 61, 325.

<sup>175</sup> See *Philips v The United Kingdom* [2001] Crim L.R. 817.

### 6.3.2 *Non-conviction based Confiscation*

Non-conviction based confiscation, also known as *in rem* confiscation (against the property, not against the owner), is defined by the FATF as confiscation through judicial procedures related to a criminal offence for which a criminal conviction is not required.<sup>176</sup> Although having the same objective as conviction-based confiscation, that is to confiscate criminal proceeds, non-conviction based confiscation works differently. An *in rem* confiscation order may be either (i) not part of criminal proceedings or (ii) made within the context of criminal proceedings but without the necessity of having to establish the criminal guilt of the property holders. *In rem* confiscation is used widely in the US (civil forfeiture or administrative forfeiture), and is now deployed effectively in many other countries (e.g., the UK,<sup>177</sup> South Africa and Australia).<sup>178</sup>

In the US, procedurally, *in rem* forfeiture (or civil forfeiture<sup>179</sup>) case is much like a civil action (entirely outside criminal proceedings). It is based on the legal fiction that the government is the plaintiff, the property is the “defendant”, and the persons objecting to the forfeiture are “claimants”.<sup>180</sup> The government files a forfeiture complaint alleging that the property in question is subject to forfeiture under the applicable forfeiture statute, and then proves on a preponderance of the evidence that the property was the proceeds or instrumentalities of crime. “Claimants” with an interest in the property are required to file claims to the property, and to respond to the forfeiture complaint within a certain period of time. If the government is successful, and no one files a claim or no “claimant” succeeds in proving that they are the innocent property owner, the court will issue judgment in favor of

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<sup>176</sup> FATF (2012), *The FATF Recommendations - Glossary* at 119, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 21 July 2013).

<sup>177</sup> Under POCA 2002 (s294-300), the UK has four different schemes for confiscation and recovery measures with regard to proceeds of crime: 1) confiscation following a criminal conviction; 2) civil recovery; 3) taxation; and 4) forfeiture of cash. Civil recovery and the forfeiture of cash scheme are forms of *in rem* confiscation in the UK. Part 5 of POCA 2002 includes a civil recovery scheme which empowers the enforcement authority to recover through civil proceedings property that is, or represents the proceeds of unlawful conduct whether or not criminal proceedings have been brought (s240(2) of POCA 2002). This part also provides forfeiture of cash scheme which enables cash that is, or represents the proceeds of unlawful conduct, or that is intended to be used in unlawful conduct to be forfeited in civil proceedings.

<sup>178</sup> Stefan D. Cassella, “The case for civil forfeiture: Why *in rem* proceedings are an essential tool for recovering the proceeds of crime” (2008) 11(1) *Journal of Money Laundering Control* 8 at 10.

<sup>179</sup> General about property subject to civil forfeiture and the provisional measures is mainly provided for in title 18 USC § 981.

<sup>180</sup> Stefan D. Cassella, “Overview of Asset Forfeiture Law in the United States” (2004) 17(3) *South African Journal of Criminal Justice* 347 at 357-359.

the government, and the property will be forfeited directly to the State. This procedure can, at the same time, provide opportunities for protection of innocent owners, and resolve the third party claims involved in the property.<sup>181</sup> The forfeiture complaint can be filed before or after indictment, or even when there is no indictment. Under title 18 USC § 981(a)(1), assets involved in money laundering subject to civil forfeiture include any property, real or personal, involved in a transaction or attempted transaction in violation of title 18 USC § 1956, 1957 and 1960, or any property traceable to such property.<sup>182</sup>

As there is no need for a criminal conviction, *in rem* confiscation can be used in certain cases to which *in personam* confiscation is not applicable. These include, for example, when the defendant has died, the wrongdoer is unknown,<sup>183</sup> the property belongs to a third party,<sup>184</sup> the wrongdoer is a fugitive,<sup>185</sup> or when the accused has already been prosecuted in a foreign country but the property related to crime is located in the State seeking to forfeit it.<sup>186</sup> However, *in rem* confiscation may not be used to confiscate the property traceable to offence in certain circumstances, for example the criminal proceeds commingled with other legal funds. This case can be dealt with by applying *in personam* confiscation in the form of “value confiscation” (or money judgment<sup>187</sup>).

### 6.3.3 *Variations in National Confiscation Legislation*

In the various national legal systems, although driven by the same goals, confiscation legislation is quite diverse and has its own characteristics. Even the confiscation legislation of States which are Parties to the suppression conventions or members of the FATF, and thus

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<sup>181</sup> See *U.S. v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 in Banco Espanol de Credito, Spain*, 295 F.3d 23 (C.A.D.Cir. 2002) 24, the court noted that “civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest”.

<sup>182</sup> In *U.S. v. \$15,270,885.69 on Deposit in Account No. 8900261137*, 2000 WL 1234593 (S.D.N.Y. 2000) 4, the court ruled that money in a bank account can be forfeited as property involved in an attempted transaction of a money laundering scheme.

<sup>183</sup> In *U.S. v. \$252,300.00 in U.S. Currency*, 484 F.3d 1271 (10th Cir. 2007), the court held that money found in a truck, which was proved (by preponderance of evidence) to be substantially connected to illegal drug trafficking, was forfeited to the government.

<sup>184</sup> See *U.S. v. Real Property and Premises known as 464 Myrtle Ave.*, 2003 WL 21056786 (E.D.N.Y. 2003)

<sup>185</sup> See *U.S. v. \$6,976,934.65 Plus Interest*, 478 F.Supp.2d 30 (D.D.C. 2007).

<sup>186</sup> See *U.S. v. Union Bank For Savings & Investment (Jordan)*, 487 F.3d 8 (1st Cir. 2007).

<sup>187</sup> In *U.S. v. Voigt*, above n161, at 1084, 1088, the court held that a defendant convicted of laundering US\$1.6 million was required to forfeit that amount as a money judgment, and that if the government could not directly trace any forfeitable proceeds to the defendant's current assets, the government could satisfy the US\$1.6 million judgment by seeking forfeiture of the defendant's assets as substitute assets.

are subject to the general mandatory provisions of these instruments, still differ in one or another of the following respects.

According to the FATF's mutual evaluation reports, whilst many States have both "property confiscation" and "value confiscation", some have only a "property confiscation" system (e.g., China<sup>188</sup>). However, the FATF does not recommend its member countries adopt "value confiscation".

With regard to the scope of application, while originally applied only to the proceeds of drug trafficking, confiscation legislation in most States has now been applied to various categories of crime. Some States have specific confiscation legislation applied to all serious offences, such as the UK (as examined above). Others apply their confiscation legislation to only a list of more serious offences, for example the US (as described above).

Confiscating the property of a third party is another complicated issue in national confiscation legislation. Most States allow the confiscation of the property or equivalent value (where "value confiscation" is applicable) from third parties who are not defendants. For example, they allow confiscation from the persons who are holding property that they know to be of criminal origin (a fairly common situation). This property may be a direct or indirect gift from a defendant, or may be still subject to the control of defendant. This confiscation procedure must protect the rights of *bona fide* third parties as stated in article 5(8) of the 1988 Vienna Convention and article 12(8) of the Palermo Convention. States can protect the rights of *bona fide* third parties by granting, for instance: the right of all interested parties to be informed about a possible confiscation order; the right to intervene in the procedure for determining a confiscation order including the right to hear and present evidence or testimony at the trial stage; and the right to challenge the confiscation order when already ordered.

## 6.4 Interim Conclusion

In summary, subject to the fundamental principles of their national legal systems, most States have developed their own confiscation legislation. The broad application of confiscation of criminal assets, flexible procedures for confiscation and an easier standard of proof applicable to confiscation order are notable trends in a number of States. "Property

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<sup>188</sup> FATF (2007), "First Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism " at 37, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20China%20full.pdf> (accessed 20 March 2014).

confiscation” and “value confiscation”, “conviction-based confiscation” and “non-conviction based confiscation” have been applied to the proceeds of a broad range of serious crimes, not just drug trafficking as originally provided for. The standard of proof for a confiscation order has been eased by the use of the civil standard in some jurisdictions. A reversal of the burden of proof in relation to the criminal origin of alleged proceeds of crime is also used in some jurisdictions to facilitate the confiscation order.

In addition, the legal framework for international cooperation in provisional measures and confiscation has made these provisions a “new” aspect of mutual legal assistance in criminal matters. This will be discussed in chapter 7.

## **6.5 Vietnamese Legislation on Confiscation of Criminal Assets**

The Vietnamese legal framework for confiscation of criminal assets consists of several scattered provisions, found mainly in the 1999 Penal Code,<sup>189</sup> the Criminal Procedure Code<sup>190</sup> and the Law on Prevention and Suppression of Money Laundering.<sup>191</sup> It is noticeable that in Vietnam, confiscation of criminal assets is conceptualized as a part of criminal proceedings (i.e. conviction-based conviction). Non-conviction based confiscation of criminal assets is unknown in Vietnam. This section will undertake a comparative analysis of the current Vietnamese legislation on confiscation of criminal assets. Comments and suggestion will also be given.

### **6.5.1 Relevant Concepts and Terminologies**

The rules relating to the control of evidence are relevant to provisional and final measures for the lawful removal of the proceeds of crime, in fact these rules substitute for separate procedures in this regard. It is noteworthy that there is no separate law of evidence in Vietnam. All rules governing the presentation of facts and proof at criminal trial, the admissibility of evidence and the exclusionary rules are provided for in the Criminal

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<sup>189</sup> Bo Luat Hinh Su [*Penal Code*] (Vietnam) Law No. 15/1999/QH10, 21 December 1999, entered into force 1 July 2000, article 41.

<sup>190</sup> Bo Luat To Tung Hinh Su [*Criminal Procedure Code*] (Vietnam) Law No. 19/2003/QH11, 26 November 2003, entered into force 1 July 2004, article 74 and 76.

<sup>191</sup> Luat Phong, Chong Rua Tien [*Law on Prevention and Suppression of Money Laundering*] (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013, articles 33 and 34

Procedure Code. Evidence is classified into four types:<sup>192</sup> i) material evidence; ii) testimony of witness, statements of parties (including statements of victim, defendants or persons who have interests or obligations involved); iv) expert opinions; and v) records of the investigative activities and documentary evidence. Evidence is admissible in court only when: i) it is objective fact; ii) the collation is subject to procedural rules provided for in the Criminal Procedure Code; and iii) it is probative.

Material evidence includes things used as instruments and means for the commission of crime, things having any trace of the criminal (e.g., blood or fingerprints of the offenders), things serving as subjects of the crime, money and other things having evidentiary value.<sup>193</sup> Thus, material evidence overlaps with the concept of the “proceeds of crime” defined by the suppression conventions. Instrumentalities for the commission of crime are material evidence.

There is no Vietnamese term equivalent to the term “proceeds of crime”. The definition of property is provided in the Civil Code<sup>194</sup> and the Law on Prevention and Suppression of Money Laundering.<sup>195</sup> However, the terms “objects” (*vat*) and “property” (*tai san*) used in several provisions in the Penal Code and Criminal Procedure Code, which are relevant to provisional measures or confiscation, are not consistent with this definition.<sup>196</sup> They indicate only tangible things and differ from money and other forms of incorporeal property.

### **6.5.2      *Provisional Measures***

“Tracing” laws like those involved in “common law tracing” do not exist in Vietnam. In addition, Vietnamese law does not provide for any particular legal provision permitting the imposition of provisional measures on property that is or may become subject to confiscation or is suspected of being the proceeds of crime. However, a number of provisions, which are obviously drafted for the main purpose of collecting and preserving evidence, allow investigative bodies to impose something like provisional measures for the eventual purpose of confiscation of criminal assets.

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<sup>192</sup> *Criminal Procedure Code*, above n190, article 64(2).

<sup>193</sup> *Ibid*, article 74.

<sup>194</sup> *Bo Luat Dan Su [Civil Code]* (Vietnam) Law No. 33/2005/QH11, 14 June 2005, entered into force 1 January 2006, article 163 provides for “property comprises objects, money, valuable papers and property rights”.

<sup>195</sup> *Law on Prevention and Suppression of Money Laundering*, above n191, article 4(2).

<sup>196</sup> This problem has been mentioned in section 4.4.1 of chapter 4.



Criminal assets can be identified and traced through the process of “Collation of Evidence” and “Evaluation of Evidence” provided for respectively in articles 65 and 66 of the Criminal Procedure Code, which state as follows:

*Article 65:*

1. Investigative bodies, the procuracy and the courts, in order to collate evidence, have the right to: summon those persons who have knowledge of the case to ask them for and hear their statements on the facts concerning the case; request expert examination; conduct searches, scene screening, and other investigative activities prescribed by this Code; require institutions and individuals involved to provide documents, objects, statements for proving the true circumstances of the case.
2. Persons participating in criminal proceedings, institutions, organizations or any individuals may present documents, objects and statements on the facts related to the case.

*Article 66:*

1. Every piece of evidence shall be evaluated to examine its legality, reality and probative value. The examination of collated evidence shall be ensured to handle a criminal case.
2. Investigators, procurators, judges and assessors, after thoroughly and objectively considering the circumstances of the case with the full spirit of responsibility, shall evaluate and examine all evidence of the case.

In addition, criminal assets can be seized pursuant to articles 144 and 145 of the Criminal Procedure Code. Article 144 allows for the seizure of correspondence, telegrams and postal parcels from the post office by warrant. Article 145 authorizes investigators to seize material evidence during a search.

A further power is provided for in article 33 of the Law on Prevention and Suppression of Money Laundering (Law on PSML), which provides that “reporting entities” shall suspend a “suspicious transaction” or the transaction that is believed to relate to criminal activities.<sup>197</sup> “Reporting entities” are defined by this law as institutions and individuals who are financial institutions, designated-non financial businesses and professions according to the FATF’s definition.<sup>198</sup> The following article 34 states that “reporting entities” shall freeze an account and temporarily seize or hold the assets of persons or organizations under the request of a competent State’s authority. However, these articles are applied to only certain institutions and individuals, and neither of them indicates what the purposes of the imposed provisional measures are. Therefore, under the present powers, Vietnamese authorities cannot impose

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<sup>197</sup> *Law on Prevention and Suppression of Money Laundering*, above n191, article 33(1).

<sup>198</sup> See *ibid*, article 4(3) and (4); and FATF, above n176, at 113, 116.

provisional measures on “non-reporting entities” who involve the transaction of a property which is subject to confiscation but does not carry any evidential value. Consequently, they may fail to confiscate this property.

### **6.5.3        *Confiscation***

#### *Assets subject to confiscation*

Article 41 of the 1999 Penal Code provides for “Confiscation of Objects and Money directly related to Crimes” as follows:

1. The following property shall be confiscated and turned over to the State treasury:
  - a) Tools and means used for the commission of a crime;
  - b) Objects or money obtained through the commission of a crime or the trading or exchange of such things or money; and
  - c) Objects banned from circulation by the State.
2. Objects and/or money illegally held or used by offenders shall not be confiscated but returned to their lawful owners or managers.
3. Objects and/money of other persons, if these persons are at fault in letting offenders use them in the commission of a crime, may be confiscated and turned over to the State treasury.

Under this article, the first group of assets (article 41(1)) subject to confiscation are objects (tangible things) and money acquired through the commission of a crime or the trading or exchange of such things. Although the wording of “or the trading or exchange of such things” can be considered to describe the property derived indirectly from the commission of a crime, this category partly covers the “proceeds of crime” (as defined by the suppression conventions). For example, objects are distinguished from intangible property, such as the legal right to use a tangible thing. “Value confiscation” is not provided for in Vietnam.

The second group of assets subject to confiscation are instrumentalities used for the commission of a crime. As noted about the criminal proceedings in Vietnam,<sup>199</sup> most instrumentalities used for the commission of a crime are seized by investigative bodies in the stage of investigation. Pursuant to article 41(1)(a) of the 1999 Penal Code, they are confiscated after the criminal proceedings have finished.

In addition, article 76 of the Criminal Procedure Code provides for the confiscation of material evidence.

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<sup>199</sup> In chapter 5.

*Article 76: Dealings with material evidence*

1. Where a case is ceased at the stage of investigation, the dealing with material evidence shall be decided by Head or Deputy Head of the Investigative Body; where a case is ceased at the stage of prosecution, the matter shall be decided by Chief Procurator or Deputy Chief Procurator of Procuracy; at the stage of trial, the matter shall be decided by Court. The execution of a decision on dealing with the material evidence must be presented in a record.

2. Material evidence shall be dealt with as follows:

a) Material evidence which consists of tools, means of a crime or prohibited goods shall be confiscated, put into the State treasury or destroyed.

b) Material evidence which consists of objects/money belonging to the State, to organizations, or to individuals appropriated by the offender or to be used as means of the crime, shall be returned to the owners or their legal administrator; should the owners or their legal administrator cannot be found, those assets and money shall be declared to become State property.

c) Material evidence which is money or properties derived from criminal activities shall be turned over to the State treasury.

d) Material evidence which is easy to be destroyed or difficult to preserve shall be sold in conformity with law.

e) Unvalued and useless material evidence shall be confiscated and destroyed.

3. In the stage of investigation, prosecution or trial, competent bodies referred to in item 1 of this article shall have the right to decide the return of the material evidences mentioned in point b, item 2 of this article to the owners or their legal administrator provided that such return would not adversely influence the addressing of the case.

4. In case there is any dispute upon ownership of material evidences, such dispute shall be settled according to the civil proceedings.

Confiscation under this article should be distinguished from the confiscation provided for by article 41 of the 1999 Penal Code. While the former is applied only to material evidence, the latter is imposed on any criminal instrumentalities and objects or money acquired through the commission of a crime or the trading or exchange of such things. Nonetheless, as mentioned in the definition of material evidence, assets may be subject to confiscation using these two different powers. For example, money subject to seizure and eventually to confiscation may be obtained from the commission of a crime and may also be material evidence subject to confiscation as such.

*Burden of proof and protection of bona fide third parties*

In practice, for instance in case 1 (drug-related crime) and case 2 (organized crime) (described in chapter 2), the Vietnamese authorities usually can confiscate only a part of the

proceeds of crime in the form of money (cash). Normally, money found at the site where a criminal conduct has been occurring (e.g., an on-going monetary transaction at the scene of illegal drug trading) is seized by the investigative body, then it is confiscated after conviction. Money found in other circumstances (e.g., after arrest) or objects (e.g., houses or cars), which were purchased by money generated from the criminal activity, is hardly ever confiscated unless there is a confession of the holders. This is because of the difficulty of establishing the burden of proof (criminal standard) that there must be a link between the money or objects and the criminal activity. It is too onerous for the law enforcement authorities to discharge. This burden of proof is equally difficult or even more difficult to discharge in cases, such as when illegal money is intermingled with legal money, or when the money that is used in the purchase is recorded as much lower in value than the actual amount paid in order to, for example, avoid tax.

At the trial stage, third parties can intervene in the procedure if they have interests involved. The court can protect and settle their interests, which include the rights of *bona fide* third parties, if it is related to the confiscation order. Article 54 of the Criminal Procedure Code states that:

1. Persons having interests and obligations related to a criminal case or their lawful representatives have the right:
  - a) To present documents, objects and claims;
  - b) To participate in court sessions; to present their opinions and arguments at court sessions in order to protect their lawful rights and interests;
  - c) To appeal against court judgments and decisions regarding matters directly related to their interests and obligations;
  - d) To complain about decisions and proceedings activities of the agencies and people authorized to conduct the criminal proceedings.
2. Persons having interests and obligations related to a criminal case must be present in response to the summonses of investigating bodies, procuracies or subpoenas of courts, and present honestly details directly involved in their interests and obligations.

Further, disputes about the ownership of material evidence shall be settled in separate civil proceedings.<sup>200</sup> The “right” in article 54(1) includes the right to property and is enforceable in practice. So this provision adheres to the international standards on protecting the right of

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<sup>200</sup> *Criminal Procedure Code*, above n190, article 76(4).

*bona fide* third parties to property subject to confiscation. However, the laws are silent on the protections to *bona fide* third parties whose property is subject to provisional measures.

Finally, it should be noted that in Vietnamese criminal law, confiscation of the above-grouped assets is applied in regard to all crimes. This type of confiscation should be distinguished from the confiscation of property provided for in article 40 of the 1999 Penal Code. Article 40 of the 1999 Penal Code provides confiscation of a convicted person's properties as an additional penalty in some certain cases. Thus, this article is not relevant to confiscation of the proceeds of crime. What is more, the seizure of property for purpose of confiscation of criminal assets differs from the seizure of property stated in article 146 of the Criminal Procedure Code. The latter allows the seizure of an accused's or a defendant's property with the aim of ensuring the payment of a pecuniary penalty or securing the compensation for victims and third parties.

#### **6.5.4      *Criticism and Suggestions for Reform***

Overall, Vietnam does not yet have a specific legal framework for provisional measures with the aim of confiscating the proceeds of crime and criminal instrumentalities. For the most part, the provisional measures available are applied for the purposes of investigating crime and collecting evidence rather than for the eventual purpose of confiscation the property derived from a criminal activity. Vietnamese authorities can utilize the existing provisions as a legal framework for imposing the provisional measures for the eventual purpose of confiscation of criminal assets. Nevertheless, this utilization does not comply with the obligation of establishing the provisional measures set out by the suppression conventions to which Vietnam is a Party.<sup>201</sup> Thus, Vietnam is currently “partly compliant” with the FATF Recommendations in this regard.<sup>202</sup> Further, the rules of evidence are designed to secure material that will assist in the conviction of defendant and the disposal of that material once convicted. The provisional measures in the AMLs have different purposes that are to locate and preserve criminal assets with the aim eventually of confiscating them. The difference in purposes inevitably means that rules for the one purpose are not fit for the other, although they may serve as a stopgap measure while awaiting new laws. Articles 33 and 34 of the Law

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<sup>201</sup> See *Palermo Convention*, above n122, article 12(2).

<sup>202</sup> APG (2009), “VIETNAM ME1 (Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism)”, at 60, available at: <http://www.apgml.org/documents/docs/17/Vietnam%20ME1.pdf> (accessed 20 April 2013).

on PSML has reflected a move of Vietnam ahead the implementation of international standards on retrieving criminal assets, but that is still not adequate. Under the current legal provisions, Vietnamese authorities may fail to confiscate certain types of property, for example, a property does not have any evidential value and is not involved in any “reporting entities”. Thus, Vietnam should, apart from the existing provisional measures for evidential purposes, provide for specific interim measures facilitating confiscation of criminal assets in its Criminal Procedure Code. This approach is also chosen by, for example, Germany.<sup>203</sup>

Although a broad interpretation of the coverage of material evidence and “objects” and money (as provided for in article 41 of the 1999 Penal Code) can cover most of the criminal assets subject to confiscation (under the suppression conventions); Vietnam does not yet allow the confiscation of intangible property and property of corresponding value, and does not apply “value confiscation”. This not only leads to non-compliance with the international standards but also hinders confiscation of criminal assets in practice. For example, it is believed that those legal inadequacies are the key hindrances to the effectiveness of asset recovery in corruption cases in Vietnam.<sup>204</sup> An estimated value of actual confiscated assets accounts for only roughly 10 per cent of the value of assets involved in corruption which should be recovered.<sup>205</sup> The majority of property obtained by offenders through their crimes has been transferred to a third party and converted into different forms.<sup>206</sup> Under the current laws, this has prevented Vietnamese authorities from retrieving the property.

The thesis suggests that article 41 of the 1999 Penal Code should be amended as follows:

*Article 41(amended): Confiscation of Property Related to Crimes*

1. The following property shall be confiscated and turned over to the State treasury:
  - a) Property used or intended to be used for the commission of a crime;
  - b) Property obtained, directly or indirectly, through the commission of a crime; and
  - c) Objects banned from circulation by the State.
2. Property illegally held or used by offenders shall be returned to their lawful owners.
3. Property of other persons, if these persons are at fault in letting offenders use it in the commission of a crime, may be confiscated and turned over to the State treasury.

<sup>203</sup> See section 94, 111b and 111e of the Criminal Procedure Code of Germany.

<sup>204</sup> Pham Anh Tuan (2014), “Co So Chinh Tri, Phap Luat Trong Thu Hoi Tai San Tham Nhung o Viet Nam [Political and Legal Basis for Asset Recovery in Corruption Cases in Vietnam]”, available at: <http://noichinh.vn/nghien-cuu-trao-doi/201405/co-so-chinh-tri-phap-ly-trong-thu-hoi-tai-san-tham-nhung-o-viet-nam-294521/> (accessed 12 June 2014)

<sup>205</sup> Chinh Phu, “Bao Cao Cong Tac Phong, Chong Tham Nhung nam 2013” [Government, Report on the Prevention and Suppression of Corruption (2013) ] No. 391/BC-CP, 10 October 2013

<sup>206</sup> See Tuan, above n204.

By using the term “property” instead of objects/money, which has already defined by article 4(2) of the Law on PSML, the categories of assets subject to confiscation listed by this article will be compliant with the international provisions (illustrated in section 6.2.3 of this chapter).

In addition, “value confiscation” should be provided for in the Criminal Procedure Code of Vietnam to deal with some circumstances, e.g., where the criminal property cannot be located or has been transferred to a third party. Vietnam may take into account the wording used in the French and German model of “value confiscation” when making its own provisions. In the meantime, Vietnam should foresee the difficulties when implementing this approach and how to address them. Vietnam can draw some lessons from the practices of the US and of the UK described above.

Vietnam should consider the possibility of providing for the reversal of burden of proof in proceedings involving confiscation of the assets allegedly involved in certain crimes, including money laundering, such as the US forfeiture model applicable to money laundering offences. Under such an arrangement, the competent authorities may require the offender to demonstrate the lawful origin of the alleged proceeds of crime or other property liable to confiscation. By doing this, the standard of proof of a link between the alleged assets subject to confiscation and the crime for which the holder was convicted can be alleviated.

In Vietnam’s law, the presumption of innocence is expressed in articles 9 and 10 of the Criminal Procedure Code. Article 9 stipulates that “nobody shall be considered guilty and be punished until the guilty judgment of a Court takes effect”. Article 10 states that:

An Investigating Body, Procuracy, Court shall adopt all lawful measures to determine the fact of a criminal case impartially, comprehensively and fully, to clarify evidence of guilt and evidence of innocence, and circumstances tending to aggravate and/or mitigate criminal liability of the accused or defendant.

The burden of proof shall be placed on the bodies conducting criminal proceedings. The accused or defendant shall be entitled but not bound to prove their innocence.

These provisions are not breached if an offender is required to satisfy that property was legally acquired to avoid being confiscated.

Vietnam also should consider the possibility of adopting “non-conviction based confiscation”, which is obviously very powerful in confiscating criminal assets.

We can see that if Vietnam makes the legal changes as suggested above, it can comply with the international obligations, at least on paper. What challenges Vietnam is how to implement the legal changes in practice effectively. It will take time for Vietnam to be familiar with the new legal concepts and procedures, for example confiscation of intangible property, “value confiscation” or “non-conviction based confiscation”.

## 6.6 Conclusion

Identification, tracing, freezing or seizure and eventually confiscation of the proceeds of crime and instrumentalities used in or intended for use in the commission of a crime are important legal tools of the AML regime. The money laundering offence is an autonomous offence closely linked to the predicate crime. The AML regime, on the one hand is a regime directly suppressing the money laundering offence, and on the other hand is a part of the regimes suppressing predicate crimes. The inadequate or ineffective adoption of these measures against the proceeds and instrumentalities of crime definitely hampers the AML regime. Specifically, the inadequacy of tracing rules will result in a failure to locate the proceeds of crime and its roots or to identify predicate offences. The inadequacy of provisional measures and of confiscation of the property suspected of being laundered facilitates the transaction and other manipulation of funds, as well as the money laundering process. These, likewise, may obstruct the investigation, prosecution and trial of money laundering offences.

The international AML regime provides for the standards of provisional measures and confiscation of criminal assets. States are encouraged to apply this type of confiscation to a broad range of crimes, and to simplify the burden of proof by adopting non-conviction based confiscation, while protecting the right of *bona fide* third parties. However, national legislation on confiscation inevitably varies in regard to: the scope of application (the proceeds of all crime or of limited number of crimes); assets subject to confiscation (property derived from criminal activities, property the value of which corresponds to the proceeds of crime, an amount of money equivalent to the criminal benefit, and criminal instrumentalities); the procedures of confiscation (conviction-based or non-conviction based confiscation); and the burden of proof for confiscation order (criminal or civil standard, acceptance of the reversal of the burden of proof).

The examination of Vietnamese legislation on confiscation of criminal assets reveals significant deficiencies, notably: i) the type of the assets subject to confiscation does not



cover intangible property and property of corresponding value; ii) the provisional measures for the purposes of confiscation are not provided for; iii) the burden of proof of confiscation order is onerous; and iv) “non-conviction based confiscation” and “value confiscation” is not applicable. These deficiencies have to be remedied.

Some complements to the provisional measures provided for in the Law on PSML show that Vietnam has implemented certain international AMLSs on confiscation of criminal assets. However, this is insufficient and Vietnam is still far being in compliance with international obligations. The fundamental legal concepts and procedures related to the retrieval of criminal assets, provided for in Vietnam’s Criminal Procedure Code, have been unchanged since 2003 when they were first introduced. This thesis argues that Vietnam should and can remedy the current situation, then obtain a better level of “paper” compliance with the international AMLSs; nevertheless, because of a number of domestic factors (e.g., an unfamiliarity with the new legal concept of and procedures for confiscation of criminal proceeds), Vietnam still has a long way to go before reaching a high degree of actual compliance.

## **Chapter 7**

### **MUTUAL LEGAL ASSISTANCE IN ANTI-MONEY LAUNDERING**

- 7.1 Introduction**
  - 7.2 General Perception**
  - 7.3 International Exchange of Information in AML**
    - 7.3.1 General*
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  - 7.8 Conclusion**
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#### **7.1 Introduction**

States often face a range of barriers in the investigation, prosecution and trial of transnational money laundering offences. They include the gathering of evidence, the service of legal documents, or the recovery of assets from other jurisdictions. These barriers can be only resolved by cooperation from other involved States, through so-called mutual legal assistance (MLA). As a result, the international community calls for the most effective and

widest possible range of MLA in fighting money laundering and associated predicate offences.<sup>1</sup>

MLA in combating money laundering has its own scope and methods that serve broad purposes. For example, the international exchange of information relating to suspicious financial transactions is beyond the traditional scope of treaty-based MLA in criminal matters. Legal assistance for the purposes of tracing, freezing or seizing, and confiscating the proceeds of crime is another “new” type of MLA. The FATF recommends that, if consistent with domestic law, countries should respond expeditiously to requests from foreign States to execute provisional measures and to confiscate laundered property, the proceeds from money laundering and from the predicate offences.<sup>2</sup> If Vietnam is to engage effectively against money laundering, it too will have to develop this capacity.

This chapter will begin by examining the international standards on MLA in combating transnational money laundering which includes the international exchange of AML-related information and treaty-based MLA. It then will examine what and how these standards have been implemented in domestic laws of Vietnam; whether Vietnamese laws on MLA in AML is compliant with the international standards; if not, what the inadequacies are. The chapter also will discuss the main factors influencing Vietnam’s practices of MLA in AML. Finally, suggestions for law reform will be made.

## **7.2 General Perception**

Traditionally, MLA in criminal matters is a process by which States seek and provide assistance in gathering evidence for use in criminal cases, and is carried out through diplomatic channels upon the receipt of letters rogatory.<sup>3</sup> In the second half of the 20<sup>th</sup> century, with the rise of transnational crime and the growing demand for legal assistance, the need for a wide range of assistance beyond evidence gathering was apparent. Hence, MLA in criminal matters has been developed as “the process whereby one State provides assistance to

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<sup>1</sup> FATF (2012), “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations”, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 22 May 2014), Recommendation 37 (R37).

<sup>2</sup> See, e.g., *ibid*, R38.

<sup>3</sup> Robert J. Currie, “Human Rights and International Mutual Legal Assistance: Resolving the Tension ” (2000) 11(2) Criminal Law Forum 143 at 145-146.

another in the investigation and prosecution of criminal offences”.<sup>4</sup> Various forms of MLA in criminal matters have been established to satisfy the scope and efficiency of assistance required. The key forms of MLA in criminal matters can be undertaken upon letters rogatory, MLA treaties and interstate “police-to-police” assistance or interstate “agency-to-agency” assistance.<sup>5</sup> The mechanisms for processing MLA can be informal or formal.

Under the informal mechanisms, governmental agencies, in particular the police and other competent agencies, can seek assistance directly from their foreign counterparts through their own channels. Informal MLA in criminal matters is usually used for administrative information exchange on an *ad hoc* basis.<sup>6</sup> It is often carried out between competent interstate agencies or individuals through nonbinding agreements (e.g., Memoranda of Understanding (MOUs)) or individual contacts. These informal means are usually employed to share intelligence and information obtained voluntarily (such as the statement of a witness) or information from publicly available sources to support law enforcement agencies in investigation or prosecution of criminal cases.<sup>7</sup> Informal communication, for example “police-to-police”, is normally faster, more flexible and economical than formal communication.<sup>8</sup> Nonetheless, confidential information may not be easily obtained by this mechanism from foreign counterparts; and the information exchanged may not serve as evidence against someone because of failure to meet due-process requirements.

Under the most formal mechanisms, normally based upon bilateral or multilateral MLA treaties, an MLA request issued by the requesting State’s Central Authority is first received by the Central Authority of the requested State (e.g., the Ministry of Justice), then is forwarded to the “competent agency” for execution (if the Central Authority is not the executing authority) and returned to the Central Authority for dispatch to its counterpart in the requesting State. When States have treaties on MLA in criminal matters, States often appoint their Central Authorities and authorize them to make or receive MLA requests

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<sup>4</sup> William C. Gilmore (ed) *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge University Press, 1995) at xii.

<sup>5</sup> John E. Harris, “*International Cooperation in Fighting Transnational Organized Crime: Special Emphasis on Mutual Legal Assistance and Extradition*,” United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders, Tokyo, 2000, at 137-139.

<sup>6</sup> IMF (2007), “*Working Together: Improving Regulatory Cooperation and Information Exchange Monetary and Financial Systems*” at 7, available at: <http://www.imf.org/external/pubs/ft/books/2007/working/0607.pdf> (accessed 10 April 2014).

<sup>7</sup> Ibid.

<sup>8</sup> See *ibid*; and Harris, above n5, at 137.

subject to their treaties.<sup>9</sup> Interstate Central Authorities normally communicate directly with one another, but an MLA request may be steered through diplomatic channels. After receiving an MLA request, the Central Authority will be responsible for reviewing such request for initial approval; such as, examining whether the request meets the requirement of any applicable treaty and complies with the domestic laws. Depending on the legal system of the requested State, the “competent agency” for execution can be the police, prosecutors or judicial officials who will obtain or issue the compulsory measures needed to provide the assistance sought.<sup>10</sup>

It can be seen that, in general, the legal basis for MLA in criminal matters consists of national legislation, treaties, MOUs (signed between States or interstate competent agencies), and the customary principle of reciprocity (when there is no existing agreement between the countries). A State can rely on one or more of these bases to process MLA. In practice, informal assistance can lay the foundation for subsequent formal MLA. Treaty-based MLA often occurs after direct interstate “agency-to-agency” cooperation. Formal treaty-based MLA and informal interstate “agency-to-agency” assistance, however, can occur at the same time.

Obviously, in any mechanism of MLA, the interstate competent agencies processing the MLA request play the most important role. They include the Central Authority responsible for making and receiving MLA requests; the authorized agencies responsible for executing the MLA requests, normally the police, procuracy or judiciary; and other related agencies, such as Financial Intelligence Units (FIUs), financial institutions (e.g., banks), and professionals (e.g., lawyer, notary or accountant). In practice, the executive agencies can receive and render MLA via the Central Authority or directly to foreign counterparts. Some bodies, such as FIUs and banks can share information about money laundering directly with each other.

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<sup>9</sup> For example, in ASEAN Member States, such as Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore and Thailand, their central authorities are the Attorney General, the Ministry of Foreign Affairs, the Ministry of Law and Human Rights, the Ministry of Foreign Affairs, the Attorney General’s Chambers, the Ministry of Home Affairs, the Department of Justice, the Attorney General’s Chambers, and the Attorney General respectively.

<sup>10</sup> For example, in Singapore, after approving a request for assistance in taking evidence or confiscation of criminal proceeds, the Attorney-General (Central Authority) or a person appointed by him has to apply to the court for the relevant orders and then to gather the evidence or confiscate the proceeds. See section 22 and 29 of the *Mutual Assistance in Criminal Matters Act of Singapore (chapter 190A, as amended in April 2006)*; and case of *Re section 22 of the Mutual Assistance in Criminal Matters Act* [2008] SGCA 41.

## **7.3 International Exchange of Information in AML**

### **7.3.1 General**

A wide range of information is shared by the competent authorities of cooperating States in the fight against money laundering. It may be evidentiary information (e.g., bank records and the identities of individual), exchanged by law enforcement agencies through the vehicle of MLA, that can be used in formal criminal proceedings; or it may be Suspicious Transaction Reports (STRs) shared by FIUs with no evidentiary weight. According to the suppression conventions, most competent national agencies dedicated to AML should be able to cooperate and exchange information at the national and international level within the conditions of their domestic law.<sup>11</sup> These agencies can be administrative, regulatory, adjudicative, or law enforcement authorities. In practice, the police are one of the crucial traditional law enforcement agencies involved in MLA in criminal matters. There are other typical interstate agencies responsible for the exchange of information relevant to AML. Among them, FIUs have an increasingly integral role in international information exchange for the purposes of AML. FIUs will be discussed later as the most significant governmental agencies engaged in international information exchange against money laundering.

### **7.3.2 Police Information Exchange**

In most States, the police are the most important law enforcement agency in combating crimes and in enforcing laws to maintain social order. Specifically, their responsibilities normally relate to many stages of investigation and prosecution of crimes, such as locating and arresting suspects, gathering evidence, identifying witnesses, and deposing witnesses in court. International police cooperation beyond the political barrier commenced at an early stage.<sup>12</sup> The increasing prevalence of transnational crime has meant that this cooperation has become more necessary and it can usually be based upon mutual respect, shared interest and good will in combating crime rather than political or economic coercion. In practice, most of the MLA requests for fighting transnational crime are ultimately executed by police. Further,

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<sup>11</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003, article 7(1)(b); and *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005, article 14(1)(b).

<sup>12</sup> Mathieu Deflem, *Policing World Society: Historical Foundations of International Police Cooperation* (Oxford University Press, 2002) at 10.

the exchange of information about crime is usually conducted by direct assistance between national police through the liaison police network or “hot lines”.<sup>13</sup> This channel seems to be the quickest means of criminal information exchange.

Police cooperation has been fostered not only by the fraternal agreements and obligations of multinational treaties but also by the strong commitment of international and regional police organizations, such as the International Criminal Police Organization (INTERPOL) and the ASEANPOL.<sup>14</sup> Interstate police forces can exchange and share information related to the investigation of money laundering. These types of information include i) general information, such as the criminal records of an individual and the identity of an individual and a corporation, already held in the databases of each State; and ii) specific information relating to a particular case, such as bank or brokerage account details, banking transaction records, tax and business records, documents disclosing purchase, sale and ownership. The suppression conventions also highlight the role of INTERPOL in MLA by suggesting that in urgent circumstances, if possible, States should communicate and address MLA requests through INTERPOL instead of diplomatic channels.<sup>15</sup>

### **7.3.3      *The Development of FIUs***

An integral part of the investigation and prosecution of money laundering offences is to have access to relevant financial information in order to identify and trace the movement of funds. In addition, the implementation of the reporting obligation creates the need for central governmental specialized agencies to process the disclosure of suspicious information to combat money laundering at both the national and international level. These agencies must be able to provide the rapid exchange of information between financial institutions and law enforcement agencies as well as between jurisdictions, while still ensuring the security and confidentiality of information. They must have adequate capacity to analyse and cross-check such information with other sources of information easily and systematically.<sup>16</sup> FIUs have

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<sup>13</sup> In *R. v. Hape*, [2007] 2 S.C.R. 292, Royal Canadian Mounted Police (RCMP) officers cooperated with police officers of the Turks and Caicos Island to conduct parts of the investigation of the accused, a Canadian businessman, for suspected money laundering. In the Islands, where the investment company of the accused was located, the RCMP officers conducted searches of the accused’s office and gathered documentary evidence with the cooperation from the Turks and Caicos Island force.

<sup>14</sup> General about these police organizations was provided in chapter 3.

<sup>15</sup> See article 18(13) of the Palermo Convention.

<sup>16</sup> J. F. Thony, “Processing Financial Information in Money Laundering Matters: The Financial Intelligence Units” (1996) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 257 at 264.

been established in most countries to in order undertake these functions. It should be noted that intelligence is an elastic notion. It may relate to the receipt and analysis of STRs, or be more strictly defined as the receipt of information by means of “undercover operations”, such as infiltration of laundering networks or use of secret informants.<sup>17</sup>

The first few FIUs were established in the late 1980s.<sup>18</sup> Following this establishment, a number of international legal instruments formally mentioned about the establishment and functions of FIUs: the 1990 FATF Recommendations, the Palermo Convention, and the UNCAC.<sup>19</sup> In 2003, for the first time, the FATF set out an explicit recommendation on the establishment and functioning of FIUs.<sup>20</sup>

Recognizing the importance of FIUs and of the global network of FIUs, in 1995, a group of FIUs gathered at the Egmont Arenberg Palace in Brussels and established the Egmont Group of Financial Intelligence Units (called the Egmont Group) for the stimulation of international cooperation.<sup>21</sup> These FIUs meet regularly to find ways to enhance mutual administrative cooperation, especially in the areas of exchanging information, training and the sharing of expertise for the purposes of AML, and more recently, the suppression of terrorism financing.<sup>22</sup> In response to the need for developing effective and practical means of exchanging information, the Egmont Group has devised a functional definition of FIUs. The first definition of FIUs was approved in 1996, consequently amended in 2004,<sup>23</sup> and recently stated in R29 of the 2012 FATF Recommendations as well as in Egmont Group Charter (2013) as follows:<sup>24</sup>

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<sup>17</sup> J. F. Thony, “Processing Financial Information in Money Laundering Matters: The Financial Intelligence Units” (1996) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 257 at 274.

<sup>18</sup> Milind Sathye and Chris Patel, “Developing Financial Intelligence: An Assessment of the FIUs in Australia and India” (2007) 10(4) *Journal of Money Laundering Control* 391 at 391.

<sup>19</sup> FATF (1990), “The Forty Recommendations of the FATF”, available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> (accessed 24 May 2013) R14 & 15; *Palermo Convention*, above n11, article 7(1)(b); and *UNCAC*, above n11, article 58.

<sup>20</sup> FATF (2003), “The Forty Recommendations”, available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf> (accessed 24 May 2013), R26.

<sup>21</sup> Egmont Group, “About the Egmont Group”, available at: <http://www.egmontgroup.org/> (accessed 24 May 2013).

<sup>22</sup> *Ibid.*

<sup>23</sup> Egmont Group, “*FIU Definition Interpretive Note*” (2004) at 1-2, available at: <http://www.egmontgroup.org/library/egmont-documents> (accessed 23 April 2013).

<sup>24</sup> Egmont Group (2013), “*Egmont Group of Financial Intelligence Units Charter*” at 5.



Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly.

Other international organizations, such as the IMF and the World Bank, as well as their Member States, have provided assistance to a number of other States in the establishment and strengthening of FIUs. As of July 2013, the number of FIU members in the Egmont Group increased to 139.<sup>25</sup>

Although FIUs have the same core functions of receiving, analysing, and disseminating financing information (additional functions may include the investigation and supervision of the financial institution's compliance with AML regulations, and training or advisory roles)<sup>26</sup>, they vary considerably from State to State in their models and functions.

In the administrative/intermediary model, an FIU (e.g., in France or the US) is usually part of the structure, or under the supervision of a regulatory or supervisory agency other than a law enforcement or judicial authority; or is an independent and centralized administrative authority.<sup>27</sup> In the law enforcement model, an FIU is attached to a general or specialized police agency, which is normally designed as a police department responsible for combating financial crime, for example, in Germany and the United Kingdom.<sup>28</sup> Following the judicial or prosecutorial model, an FIU is affiliated to a judicial authority and most commonly falls under the prosecutor's jurisdiction.<sup>29</sup> This model is commonly used in continental law States where public prosecutors have control over criminal proceedings and investigatory bodies, such as in Switzerland. In the hybrid model, an FIU is established by a combination of at least two of the FIU models mentioned above, which can obtain the advantages of the various models described previously.<sup>30</sup>

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<sup>25</sup> The Egmont Group (2014), "2012-2013 Annual Report", available at: <http://www.egmontgroup.org/news-and-events/news/2014/01/23/2012-2013-egmont-group-annual-report> (accessed 20 March 2014).

<sup>26</sup> Thony, above n16, at 274-279.

<sup>27</sup> IMF, "Financial Intelligence Units: An Overview" at 10-13, available at: <http://www.imf.org/external/pubs/ft/FIU/index.htm> (accessed 20 December 2012).

<sup>28</sup> Ibid, at 13-15.

<sup>29</sup> Ibid, at 16.

<sup>30</sup> Ibid, at 17.

### 7.3.4 *Information Exchange through the FIU Network*

The information available to FIUs may be of interest to non-FIU authorities, for example, law enforcement agencies in charge of the investigation or prosecution of money laundering. Both FIUs and other authorities may desire the exchange of financial information. FIUs themselves can benefit from exchanging information with authorities other than FIUs.<sup>31</sup>

The Egmont Group is a unique network employed for the exchange of financial information, primarily of STRs. The FIU to FIU channel is recognized as an expeditious conduit for exchanging information with, or on behalf of each jurisdiction's respective law enforcement and other competent AML authorities.<sup>32</sup> This channel of information exchange is normally not subject to the more burdensome requirements of other forms of information exchange, such as treaty-based MLA.

Most States authorize their FIUs to exchange information with other FIUs of any type in accordance with domestic legislation and the international principles of FIUs information exchange. The Egmont Group has adopted principles and best practice guidelines for FIU members to exchange information in money laundering and terrorism cases.<sup>33</sup> The principles encourage international cooperation among FIUs on the basis of reciprocity or mutual agreement following the basic rules:<sup>34</sup>

- i) Free exchange of information for purposes of analysis at FIU level.
- ii) No dissemination or use of the information for any other purpose without prior consent of the providing FIU.
- iii) Protection of the confidentiality of the information.

Nevertheless, the obstacles to information exchange between FIUs are unavoidable, because FIUs are each subject to a diverse set of national legal, political and economic constraints.

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<sup>31</sup> The Egmont Group (2011), *"Resolution of the Heads of FIUs of the Egmont Group: Enhancing International AML/CFT information Exchange through Strengthening FIU Channels in "diagonal" Cooperation"* at 1.

<sup>32</sup> Ibid.

<sup>33</sup> See The Egmont Group (2013), "Principles for Information Exchange between Financial Intelligence Units", available at: <http://www.egmontgroup.org/about> (accessed 21 March 2014); and Egmont Group (2013), "Operational Guidance for FIU Activities and the Exchange of Information", available at: <http://www.egmontgroup.org/about> (accessed 21 March 2014).

<sup>34</sup> See Egmont Group (2013), above n24.

Some States empower their FIUs to exchange information with their counterparts without the need for a formal agreement between them, other States require their FIUs to enter a model MOU designed by the Egmont Group.<sup>35</sup> A typical MOU set out the terms and conditions for sharing information, such as identification of the Parties, the type of information eligible for sharing, and restrictions on dissemination of the shared information.<sup>36</sup>

To sum up, in accordance with international standards, FIUs have been uniquely created and empowered in numerous States to perform their core functions of transnational exchange of financial information in order to combat money laundering and financing terrorism. It is recognized that the best way to promote the sharing of information for AML/CFT purposes in a secure manner is to strengthen the FIU to FIU channel.<sup>37</sup>

## **7.4 Treaty-based Mutual Legal Assistance**

### **7.4.1      *The Legal Basis and Types of Mutual Legal Assistance***

#### *The legal basis*

Treaty-based MLA in the fight against money laundering is usually governed by international, regional or bilateral legally binding treaties. Some treaties focus only on the MLA provisions applied generally to a wide range of criminal matters, such as the Treaty on Mutual Legal Assistance in Criminal Matters signed among like-minded ASEAN member countries (2004).<sup>38</sup> In other treaties, for instance the suppression conventions, MLA is mentioned as a part of them.<sup>39</sup> Pursuant to these provisions and the FATF Recommendations, State Parties and member countries “shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings” in relation to money laundering offences.<sup>40</sup> A number of typical aspects of MLA in money laundering cases

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<sup>35</sup> The Egmont Group (2013), *"Egmont Group of Financial Intelligence Units Principles for Information Exchange between Financial Intelligence Units"* at 4; and IMF, above n27, at 67-68.

<sup>36</sup> IMF, above n27, at 67-68.

<sup>37</sup> The Egmont Group (2011), above n31.

<sup>38</sup> ASEAN Treaty on Mutual Legal Assistance in Criminal Matters (2004) 29 November 2004.

<sup>39</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990, article 7; *Palermo Convention*, above n11, article 7(1)(b), article 7(4), articles 18, 21, 26 and 27; and *UNCAC*, above n11, article 14(1)(b), article 14(5), articles 46, 47 and 48.

<sup>40</sup> *1988 Vienna Convention*, above n39, article 7(1); *Palermo Convention*, above n11, article 18(1); *UNCAC*, above n11, article 46(1); and FATF, above n1, R37.

include:<sup>41</sup> providing originals or certified copies of relevant documents and records, including government, bank, corporate or business records; and identifying or tracing the proceeds of crime, property, instrumentalities or other things for evidentiary purpose.

Bilateral treaties are a common and effective legal basis for MLA in the fight against money laundering, especially between those States which share land borders or have close relations. For example, a well-known bilateral treaty on MLA in criminal matters was concluded by the US and the Swiss Confederation in 1973 and entered into force in 1977.<sup>42</sup> It was the first bilateral treaty on MLA in criminal matters reached between a common law State and a civil law State.<sup>43</sup> This treaty has become a successful model for later treaties on MLA in criminal matters especially regarding cooperation in freezing or seizing of assets and taking evidence from a foreign country possessing strict banking secrecy, the strong tradition of legality and the prickly sense of national sovereignty.<sup>44</sup> Nowadays, several bilateral treaties have extensive provisions that detail obligations in regard to MLA in tracing, freezing or seizing, and confiscating the proceeds of crime. It can be seen that by negotiating bilaterally, States can shape an agreement applicable to their particular legal systems and purposes. Bilateral treaties are able to resolve legal obstructions between the States with different legal traditions. Some States, for instance, restrict assistance to judicial authorities rather than prosecutors.<sup>45</sup>

Besides treaties, most States have their own laws on MLA that usually specify the conditions and procedures for making, transferring and executing incoming and outgoing MLA requests. These laws are often made in conformity with the international norms and principles derived from the relevant treaties. In most instances, such laws create a necessary domestic legal framework to allow the State to give effect to its obligations under these treaties. Other States have passed legislation on MLA without becoming party to a related treaty. This legislation, however, may be sufficient to execute a request for MLA when the customary principle of reciprocity is applied. For instance, Thailand's Act on Mutual Assistance in Criminal Matters provides that assistance may be given even if no mutual legal

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<sup>41</sup> 1988 Vienna Convention, above n39, article 7(2); Palermo Convention, above n11, article 18(3); and UNCAC, above n11, article 46(3).

<sup>42</sup> Treaty on Mutual Assistance in Criminal Matters (United States - Switzerland ) 27 U.S.T 2019, T.I.A.S. No 8302, 1973.

<sup>43</sup> Lionel Frei and Stefan Trechsel, "Origins and Applications of the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters" (1990) 31(1) Harvard International Law Journal 77 at 77-78.

<sup>44</sup> Ibid, at 90-95.

<sup>45</sup> UNODC (2006), "Legislative Guide for the Implementation of the United Nations Convention against Corruption" at 197.

assistance treaty exists between Thailand and the requesting State, provided that that State commits itself to assist Thailand in a similar manner when requested.<sup>46</sup>

### *Types of MLA*

The suppression conventions, regional treaties and bilateral treaties on MLA normally provide for a broad range of types of MLA for general criminal matters.<sup>47</sup> For example, article 1(2) of the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters provides a full range of normal types of MLA:

- (a) Taking of evidence or obtaining voluntary statements from persons;
- (b) Making arrangements for persons to give evidence or to assist in criminal matters;
- (c) Effecting service of judicial documents;
- (d) Executing searches and seizures;
- (e) Examining objects and sites;
- (f) Providing original or certified copies of relevant documents, records and items of evidence;
- (g) Identifying or tracing property derived from the commission of an offence and instrumentalities of crime;
- (h) The restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated;
- (i) The recovery, forfeiture or confiscation of property derived from the commission of an offence;
- (j) Locating and identifying witnesses and suspects; and
- (k) The provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.

It can be seen that, in general, there are two categories of assistance: i) assistance in gathering evidence of crime; and ii) assistance for purposes of confiscation of criminal assets and asset recovery. For the purposes of collating evidence in money laundering cases, the assistance in seizure of property or freezing financial transactions and in providing financial records would be most important. The second category will be examined further in a later section of this chapter.

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<sup>46</sup> The Act on Mutual Assistance in Criminal Matters 1992 (Thailand) B.E.2535, section 9.

<sup>47</sup> *Palermo Convention*, above n11, article 18(3); and *UNCAC*, above n11, article 46(3).

#### 7.4.2 *Primary Conditions and Principles*

##### *The condition of dual/double criminality*

The question of double criminality as a condition of MLA (and extradition) relates to whether the act is punishable under the law of State in which the act is brought (*lex fori*). For instance, when State A makes a request for legal assistance (or extradition) from State B, the relevant authorities of State B would ordinarily assume that the act in relation to which the legal assistance (or extradition) is required is punishable under the law of State A. The authorities of State B would, however, focus on the question whether the act is punishable under its domestic criminal law.

Dual/double criminality is a common requirement in the treaty-based MLA context, but not a mandatory condition. In some international conventions, the absence of double criminality may be considered as one of the grounds consistently relied on to refuse MLA.<sup>48</sup> Nonetheless, the terms of these conventions do not prohibit their State Parties from assisting in the absence of double criminality; the requested State may still provide assistance if permitted by its domestic law. In respect of MLA in money laundering cases, the FATF recommends that “countries should render MLA, notwithstanding the absence of dual criminality, if the assistance does not involve coercive actions”.<sup>49</sup> The coercive actions herein may be search, seizure or freezing of criminal assets; or other measures which may violate an individual’s rights, such as surveillance of persons or intercepting communication. In practice, many countries have adopted this recommendation to make MLA in criminal matters more flexible and realistic.<sup>50</sup> Under Philippines’s laws, for example, MLA requests involving search and seizure only have to meet the “probable cause” requirement. “Probable cause” is defined in the Philippines as “such facts and circumstances which would lead a reasonable discreet and prudent man to believe that an offence has been committed, and that the objects sought in connection with the offence are in the place sought to be searched”.<sup>51</sup>

The FATF also recommends that “where dual criminality is required for MLA, that requirement should be deemed to be satisfied regardless of whether both countries place the

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<sup>48</sup> *Palermo Convention*, above n11, article 18(9); and *UNCAC*, above n11, article 46(9).

<sup>49</sup> FATF, above n1, R37.

<sup>50</sup> Most the countries of G20 do not require dual criminality when executing MLA requests in criminal matters, except for the request involved in coercive actions. See G20 Anti-Corruption Working Group, “Requesting Mutual Legal Assistance in Criminal Matters from G20 Countries: A Step-by-step Guide 2012”, available at: <http://www.g20.org/> (accessed 3 August 2013).

<sup>51</sup> See *Burgos, Sr., vs. Chief of Staff of the Armed Forces of the Philippines*, 133 Supreme Court Reports Annotated [SCRA] 800.

offence within the same category of offence, or denominate the offence by the same terminology, provided that both countries criminalize the conduct underlying the offence”.<sup>52</sup> It means that if dual criminality is required, that requirement should be *in abstracto*. In practice, however, depending on specific legal assistance requests, the requirement of dual criminality will be justified either *in abstracto* or *in concreto*. For instance, as long as an alleged criminal is still being investigated, it will be difficult to require the condition of dual criminality *in concreto*; hence, dual criminality *in abstracto* suffices for investigatory measures. It is often required that the conduct in question be criminalized under the criminal laws of both States. In contrast, with regard to a request for conviction-based confiscation in form of “transferring the request for confiscation”,<sup>53</sup> it is essential to ensure that the offence is liable to punishment in the requested State, and the possible grounds for exclusion of criminal liability shall be taken into account. Thus the condition of dual criminality should be applied *in concreto*.

Dual criminality can be problematic in processing MLA requests when it is applied to a legal person, especially in cases of alleged corporate criminal liability. A number of States have not yet recognized corporate criminal liability, and thus may refuse a request for legal assistance regarding the execution of investigatory measures, provisional measures or confiscation of the proceeds of corporate crime.

#### *Principle of ne bis in idem*

In the context of the enforcement of foreign criminal judgments including confiscation orders, the transnational *ne bis in idem* principle can have three crucial functions: i) it can serve as a ground for refusal of MLA when the requested State or a third State has already undertaken action with respect to the same offence;<sup>54</sup> ii) it can serve as a bar to further action taken by the requested State (e.g., in case the foreign confiscation order is recognized, this order will have the same *res judicata* effect as the domestic confiscation order); and iii) it can

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<sup>52</sup> FATF, above n1, R37.

<sup>53</sup> There are two forms of requests for confiscation, viz. “transferring the request for confiscation” and “execution of the confiscation order” which are described in the next section.

<sup>54</sup> For example, article 18(21)(c) of the *Palermo Convention*, above n11, provides that MLA may be refused “if the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction”.

serve to prevent the requesting State from enforcing a criminal judgment after it has transferred its enforcement to another State.<sup>55</sup>

The main concern here is the transnational application of the *ne bis in idem* principle in the context of executing a foreign confiscation order. The unilateral enforcement of extraterritorial confiscation may give rise to “double confiscation” when more than one State may want to confiscate the same proceeds from the same offence. This situation creates a positive concurrent jurisdiction to enforce. Effective operation of the transnational *ne bis in idem* principle can bar double confiscation. The States involved should consult each other to determine which State would ultimately enforce the confiscation order successfully.

## **7.5 Legal Assistance for Purposes of Confiscation of Criminal Assets, Sharing of Confiscated Assets and Returning Assets**

### **7.5.1 Legal Assistance for Confiscation of Criminal Assets**

When a State wishes to enforce its confiscation order against criminal assets located abroad, it can request assistance from other States involved regarding the identification, freezing or seizure, and eventually confiscation of those assets. International cooperation in identifying, tracing, seizing, and eventually confiscating criminal assets located abroad is provided for in the primary international instruments: the 1988 Vienna Convention (article 5(4)), the Palermo Convention (article 13), the UNCAC (article 55) and the FATF Recommendations (Interpretative Note to R4 (INR 4) of the 2012 Recommendations).

Because of the different approaches to confiscation of criminal assets adopted by various States and “given the unparalleled ambition and intrusiveness” of cooperation in confiscation of criminal assets, this type of international cooperation will cause lots of difficulties in practice. Therefore, the suppression conventions cautiously provide that a State Party, after receiving a cooperation request, “to the greatest extent possible within its legal system” to execute the request.<sup>56</sup> The term “to the greatest extent possible within its domestic legal system” is intended to reflect the variations in the way that different State Parties carry out the obligations of cooperation in confiscation of criminal assets. In practice, due to diverse national legal principles, the application by States of the international standards on retrieving

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<sup>55</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) at 409-410.

<sup>56</sup> See, for example, *Palermo Convention*, above n11, article 13(1).



criminal assets differs in scope and in the kind of procedures used. As a result, this cooperation is primarily executed based on MLA treaties which comply with the main provisions of the suppression conventions set out below.

Article 5(4)(b) of the Vienna Convention, article 13(2) of the Palermo Convention and article 55(2) of the UNCAC deal with the response to a request from another State concerned with the provisional measures of identifying, tracing, and freezing or seizing the various types of criminal assets. These measures are seen as the essential early steps leading towards confiscation. They prevent any criminal asset subject to confiscation from being removed or disposed of. The suppression conventions merely impose the obligation on the requested States to take provisional measures in response to a request from the requesting State. This obligation is, of course, subject to the safeguard clause “in accordance with and subject to the provisions of its domestic law”, embodied in article 5(4)(c) of the Vienna Convention and article 13(4) of the Palermo Convention. There is no provision for the procedure for taking of the provisional measures in the requested State. In practice, the procedure must satisfy the legal restrictions of the State that is enforcing it and the legal requirements of the State making the request in order for the process to be defensible in that State.<sup>57</sup> In general, it could be similar to the procedure for undertaking a confiscation order set out below.<sup>58</sup>

Article 5(4)(a) of the Vienna Convention and article 13(1) of the Palermo Convention address the assistance provided for by one State Party to another in the context of confiscation. After receiving a request for confiscation from the requesting State, if assistance is given, the requested State submits the request to its competent authorities which will have two options.<sup>59</sup> The first option - “transferring the request for confiscation”, is set out in article 5(4)(a)(i) of the Vienna Convention and article 13(1)(a) of the Palermo Convention. This procedure operates in a situation where no confiscation order is issued in the requesting State.

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<sup>57</sup> Several complicated issues arise where the requesting State and requested State have different approaches to the confiscation order, for example, where one State applies conviction-based confiscation and the other employs non-conviction based confiscation. In this situation, the procedures for imposing the provisional measures in two States are not the same. The case *Re S-L* indicates that the complexity still arises when both States involved (the US and the UK) both adopt non-conviction based confiscation. In this case, the English Court of Appeal, based on a flexible interpretation of the relevant legislation, held that a restraint order could be obtained in the UK in relation to property ordered confiscated civilly by the US. See *Re S-L (Restraint Order)*: *External Confiscation Order*: [1996] Q.B. 272 (Court of Appeal, Civil Division).

<sup>58</sup> United Nations (1998), “*Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*” at par. 5.24, available at: [http://www.unodc.org/documents/treaties/organized\\_crime/Drug%20Convention/Commentary\\_on\\_the\\_united\\_nations\\_convention\\_1988\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/Drug%20Convention/Commentary_on_the_united_nations_convention_1988_E.pdf) (accessed 28 April 2013).

<sup>59</sup> Stessens, above n55, at 385-390.

In this situation, the request for confiscation is made for the first time in the requested State and in accordance with its domestic legislation. The competent authority of the requested State, usually its judicial authority, has the discretion to grant or decline an order of confiscation upon the provision of sufficient documentary support by the requesting State. This procedure is a type of transfer of criminal proceedings. The second option - “execution of the confiscation order”, provided for in article 5(4)(a)(ii) of the Vienna Convention and article 13(1)(b) of the Palermo Convention, deals with the situation in which the confiscation order has already been issued in the requesting State and its enforcement is sought in the requested State. The requested State will submit this confiscation order to its competent authorities. If the enforcement of this confiscation order is given effect, it will be executed according to the requested State’s legislation. This option clearly requires the recognition of the foreign confiscation order from the requested State, which is a form of enforcement of foreign criminal judgment. This option appears to be faster and more efficient, and has thus become the preference of many States.<sup>60</sup>

Whichever option is chosen, however, it must comply with the legislation of the requested State, the related bilateral or multilateral treaties, and other agreements or arrangements.<sup>61</sup> States may refuse to co-operate in confiscation on a number of grounds provided for in the suppression conventions.<sup>62</sup> Cooperation may be refused, for example, if the execution of the confiscation request would be contrary to the fundamental legality principles, such as the condition of double criminality if required and the *non bis in idem* principle.<sup>63</sup> A request for confiscation also may be refused if it “is likely to prejudice the sovereignty, security, *ordre public* or other essential interest” of the requested States.<sup>64</sup> In addition, many States do not recognize *in rem* confiscation, thus will refuse the enforcement of a foreign *in rem* confiscation order and the related provisional measures.<sup>65</sup> However, the FATF recommends that countries should not refuse MLA on the grounds of fiscal matters, secrecy or confidentiality;<sup>66</sup> and that countries should include being able to respond to non-conviction-based confiscation proceedings and the related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.<sup>67</sup>

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<sup>60</sup> United Nations, above n58, par. 5.79.

<sup>61</sup> 1988 Vienna Convention, above n39, article 5(4) (c).

<sup>62</sup> Ibid, article 7(15); Palermo Convention, above n11, article 18(21); and UNCAC, above n11, article 46(21).

<sup>63</sup> See Palermo Convention, above n11, article 18(21)(c)

<sup>64</sup> See *ibid*, article 18(21)(b).

<sup>65</sup> Ibid, article 18(21)(d).

<sup>66</sup> FATF, above n1, R37(c) and (d).

<sup>67</sup> Ibid, R38.

Article 5(4) (d) of the Vienna Convention and article 13(3) of the Palermo Convention are concerned with the detailed information included in a confiscation request. According to these provisions, in addition to the general information required in an ordinary MLA request,<sup>68</sup> other supplementary information must be contained in a confiscation request. The provisions have been also incorporated in other articles that govern MLA in general, for example, article 7 (paragraphs 6 to 19) of the 1988 Vienna Convention and article 18 of the Palermo Convention.

### **7.5.2      *Sharing of and Returning Confiscated Assets***

How do States (the requested State and requesting State) address the situation when both of them have an interest in the confiscated assets? Both States may claim a share in the confiscated assets, and they have justification for doing so. The States have enforced their laws and may have suffered from the consequences of the crime related to the assets. They both deserve recompense for their efforts or to make it possible to provide victim compensation.<sup>69</sup> Sharing of confiscated assets may also give financial incentives for States to provide cooperation in confiscation of criminal assets. In this situation, the suppression conventions suggest that the requested State consider “sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures”.<sup>70</sup> The FATF also recommends the sharing of confiscated assets.<sup>71</sup> Some States (e.g., the UK), when signing bilateral treaties on MLA in criminal matters, vigorously negotiate for the inclusion of the sharing of assets in the scope of MLA.<sup>72</sup>

The requested State is required to return the confiscated assets to the requesting State in certain circumstances provided for in article 57(3) of UNCAC, which refer to: i) the case of embezzlement of public funds or of laundering of embezzled public funds;<sup>73</sup> and ii) if the

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<sup>68</sup> The general information of a MLA request is specified in, for example, *Palermo Convention*, above n11, article 18(15).

<sup>69</sup> This argument is also supported by Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) at 235, 246.

<sup>70</sup> *1988 Vienna Convention*, above n39, article 5(5)(a)(ii); and *Palermo Convention*, above n11, article 14(3)(b).

<sup>71</sup> FATF, above n1, R38.

<sup>72</sup> See *Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Socialist Republic of Vietnam on Mutual Legal Assistance in Criminal Matters* Vietnam No. 1 (2009), signed in Hanoi on 13 January 2009, article 1(3)(i).

<sup>73</sup> *UNCAC*, above n11, article 57(3)(a).

assets are not these funds, when the requesting State reasonably establishes its prior ownership of such assets or when the requested State Party recognizes damage to the requesting State as a basis for returning the assets.<sup>74</sup> In other cases, the requested State must prioritize the return of the assets to the requesting States or to their prior legitimate owners, or the compensation of the victims of the crime.<sup>75</sup>

## **7.6 Interim Conclusion**

In summary, due to the growing gravity of transnational money laundering, the scope of MLA in combating money laundering has been considerably widened. It now encompasses almost every stage of criminal proceedings. MLA may occur outside formal criminal proceedings, such as the administrative exchange of information about STRs, or the enforcement of criminal judgments over money laundering offenders. MLA can be processed through channels of information exchange between the interstate competent authorities, for example FIUs, or through more formal treaty-based mechanism. The FIU network plays an important role in exchanging the AML information internationally, because it is based on flexible legal instruments, such as MOUs. MLA, especially treaty-based MLA, is normally subject to the traditional recognized condition/principles and the applicable professional regulations (for instance, in respect to banking secrecy, professional privilege or financial privacy). However, these conditions/principles and regulations may be relaxed when applied to AML. For example, requests for MLA should not be refused on the ground that domestic laws require financial institutions to maintain secrecy or confidentiality.

Among all types of legal assistance, MLA in the execution of foreign provisional measures and confiscation of the proceeds of crime is undeniably crucial for combating money laundering offences.

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<sup>74</sup> Ibid, article 57(3)(b).

<sup>75</sup> Ibid, article 57(3)(c).

## 7.7 Provision of Mutual Legal Assistance by Vietnam

### 7.7.1 *The Exchange of AML Information by the Police and FIU*

The State Bank of Vietnam (SBV) and the Ministry of Public Security (MPS) are the primary State agencies which are vested with authority to process MLA in AML.<sup>76</sup> This section deals with the responsibilities and practices of these agencies.

“Police-to-police” or police-to-other law enforcement authorities assistance must be conducted in adherence to relevant bilateral agreements and MOUs signed by the MPS (such as with the Ministry of Internal Affairs of China in 1993 and Ministry of Internal Affairs of Cambodia in 2001).<sup>77</sup> In 2006, the MPS and the US Drug Enforcement Administration (DEA) signed an MOU which aims to enhance information exchange and cooperation between the two interstate agencies on combating transnational drug-related crime including money laundering.<sup>78</sup> In 2010, the Vietnam-Australia Joint Transnational Crime Centre (JTCC) was established in Ho Chi Minh City to improve the cooperation in combating transnational crime between the Vietnamese and Australian police forces (Australian Federal Police (AFP)).<sup>79</sup> The JTCC collects, analyses and shares information relevant to transnational crime, including money laundering.

ASEANAPOL, of which Vietnam is a member, has also developed the electronic ASEANAPOL Database System (e-ADS).<sup>80</sup> In 2007, ASEANAPOL reached a historic information-sharing agreement with the Lyon-based INTERPOL, which enables officers of INTERPOL National Central Bureaus (NCBs) around the world to access the criminal information stored in the e-ADS.<sup>81</sup> The police of ASEAN member States can also access the INTERPOOL criminal database system. The ASEANAPOL Secretariat, which began its operations in 2010, facilitates intelligence and information sharing/exchange, coordinates

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<sup>76</sup> See Luat Phong, Chong Rua Tien [*Law on Prevention and Suppression of Money Laundering*] (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013, article 48.

<sup>77</sup> Interpol Vietnam (2011), *Report on Result of International Cooperation in Combating Transnational Crime through the INTERPOL Channel from 1991-2011* at 6.

<sup>78</sup> Voice of Vietnam (VOV) (2006), “Vietnam, US cooperate in combating transnational drug-related crime”, available at: <http://english.vov.vn/Society/Vietnam-US-cooperate-in-combating-transnational-drugrelated-crime/30343.vov> (accessed 4 August 2013).

<sup>79</sup> The JTCC is jointly funded by the Ministry of Public Security and AFP’s Law Enforcement Cooperation Program (LECP). See JTCC, “Vietnam - Australia Joint Transnational Crime Centre”, available at: [http://www.jtcc.vn/index\\_e.html](http://www.jtcc.vn/index_e.html) (accessed 01 July 2014).

<sup>80</sup> See chapter 3. However, this database is still limited in its information.

<sup>81</sup> INTERPOL (2007), “INTERPOL and Aseanapol sign historic information-sharing agreement”, available at: <http://www.interpol.int/News-and-media/News-media-releases/2007/N20070607b> (accessed 10 July 2013)

joint operations involving criminal investigation, maintains the e-ADS, and works to enhance the AML capacities of the region.<sup>82</sup>

The Vietnamese police joined INTERPOL in 1991 and ASEANPOL in 1996.<sup>83</sup> From 1991-2011, through the channels of INTERPOL and ASEANPOL, Interpol Vietnam received and processed around 12,700 requests for the exchange of information in relation to transnational crime, including financial crimes (e.g., smuggling, economic frauds and money laundering<sup>84</sup>), drug trafficking, cyber-crimes, environmental crimes and terrorism.<sup>85</sup> The Transnational Crime Information Database of Vietnam established by the Interpol Vietnam has been connected with INTERPOL's I-24/7 network and the e-ADS.<sup>86</sup>

The Vietnam's Anti-Money Laundering Department (AMLD), which is attached to the SBV, functions as an administrative FIU model. It is an independent and centralized administrative authority responsible for receiving and processing information concerning money laundering reported by financial institutions and professions.<sup>87</sup> Currently, the AMLD, with 26 staff members, has a limited capacity to engage in international cooperation in AML.<sup>88</sup> The AMLD has not applied to become a member of the Egmont Group of FIUs. As of June 2014, the AMLD has signed MOUs with the FIU of Malaysia, Indonesia, Laos, Cambodia, South Korea, Thailand and Japan to facilitate the transnational exchange of information in AML between the AMLD and the FIUs of these States.<sup>89</sup> In practice, the

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<sup>82</sup> ASEANPOL, "About ASEANPOL", available at: <http://www.aseanapol.org/home> (accessed 6 August 2013).

<sup>83</sup> Interpol Vietnam was officially established as a Department of the Ministry of Public Security in 1993.

<sup>84</sup> In May 2013, the investigating agency of Vietnam, in cooperation with the Federal Bureau of Investigation (FBI) of the US, arrested *Vu Van Lang* who was found to be engaging in an unlicensed business of money transactions in Vietnam (see *United States of America v. Liberty Reverse, et al.* (noted at chapter 2)). He has been convicted of operating an "unlicensed business" under article 159 of the 1999 Penal Code of Vietnam. See T. Hoa and P. Thuy (2013) "Co Quan Cong An Da Xac Dinh Nhieu Doi Tuong Chuyen "Tien Ban" Vao Viet Nam [Police Force Revealed many Offenders Transferring "Dirty Money" to Vietnam]", *Cong An Nhan Dan*, 7 June 2013, available at: <http://www.cand.com.vn/vi-VN/phapluat/2013/6/200841.cand> (accessed 11 July 2013).

<sup>85</sup> Interpol Vietnam (2011), above n77.

<sup>86</sup> I-24/7 is the network that enables the police of State members to access INTERPOL's criminal database. See INTERPOL, "Exchange data", available at: <http://www.interpol.int/INTERPOL-expertise/Data-exchange/I-24-7> (accessed 4 August 2013).

<sup>87</sup> See Ngan Hang Nha Nuoc Viet Nam, "Quyết Định Quy Định Chức Năng, Nhiệm Vụ, Quyền Hạn và Cơ Cấu Tổ Chức Của Cục Phòng, Chống Rửa Tiền" [*State Bank of Vietnam, Decision on Defining the Functions, Tasks, Authorities and Structure of the Anti-Money Laundering Department*] No. 1654/QĐ-NHNN, 14 July 2009

<sup>88</sup> In an interview with the Deputy Director of the AMLD on 12 June 2014.

<sup>89</sup> VOV (Voice of Vietnam) (2009), "Ky Ket Trao Đổi Thông Tin Liên Quan Đến Phòng, Chống Rửa Tiền [Signing an Agreement on Exchanging Information Related to Anti-Money Laundering]", available at:

AMLD has received and processed a number of requests for providing information related to money laundering from different States.<sup>90</sup>

### **7.7.2 Treaty-based Mutual Legal Assistance**

Vietnam processes MLA in criminal matters, including in AML, on the basis of multilateral and bilateral treaties and its relevant domestic laws. This section examines the legal basis, procedure and conditions/principles for assistance in criminal matters provided by Vietnam. This section also discusses briefly Vietnam's practice.

#### *Multilateral and bilateral treaties*

Vietnam is a Party to the ASEAN treaty on MLA in criminal matters,<sup>91</sup> the 1988 Vienna Convention, the Palermo Convention and the UNCAC. As of September 2012, Vietnam has also signed bilateral treaties on MLA in criminal matters with 16 States (the Czech Republic (1982), Cuba (1984), Hungary (1985), Bulgaria (1986), Poland (1993), Laos (1998), Russia (1998), China (1998), Ukraine (2000), Mongolia (2000), and Belarus (2000), the Democratic People's Republic of Korea (North Korea) (2002), the Republic of Korea (South Korea) (2003), India (2007), the UK (2009) and Algeria (2010).<sup>92</sup>

It should be noted that the majority of the bilateral treaties were signed between Vietnam and former communist States. All the bilateral treaties prior to 2000 focus on assistance in gathering evidence and exclude MLA in retrieving criminal assets. Only recent treaties, with the Republic of Korea, India, the UK and Algeria, include this type of MLA.

All the multilateral treaties oblige Vietnam to implement a wide range of types of MLA, including assistance in confiscation of criminal assets, sharing confiscated assets and returning assets. We will see below whether and how Vietnam has implemented these obligations in its national law.

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<http://vov.vn/Xa-hoi/Ky-ket-trao-doi-thong-tin-lien-quan-den-phong-chong-rua-tien/123641.vov> (accessed 5 July 2013).

<sup>90</sup> Ibid.

<sup>91</sup> *ASEAN Treaty on MLA in Criminal Matters*, above n29.

<sup>92</sup> Ministry of Foreign Affairs of Vietnam (2012), "Danh Muc Hiep Dinh Tuong Tro Tu Phap Giua Viet Nam va Cac Nuoc [List of Mutual Legal Assistance Treaties between Vietnam and other States]", available at: <http://lanhsuvietnam.gov.vn/Lists/BaiViet/B%3%A0i%20vi%E1%BA%BFt/DispForm.aspx?List=dc7c7d75-6a32-4215-afeb-47d4bee70eee&ID=414> (accessed 4 August 2013).

### *Domestic legal framework*

In Vietnam, prior to 2007, the most important legal provisions on MLA in criminal matters were articles 341, 342, 345 and 346 of the 2003 Criminal Procedure Code (CPC), which read as follows:

#### *Article 341: Providing Legal Assistance*

When providing legal assistance, the competent agencies and persons of the Socialist Republic of Vietnam who conduct criminal proceedings, shall apply the provisions of relevant international treaties which the Socialist Republic of Vietnam has signed or acceded to, and the provisions of this Code.

#### *Article 342: Refusal of Legal Assistance Requests*

The competent agencies of the Socialist Republic of Vietnam who conduct criminal proceedings may refuse legal assistance requests in criminal proceedings under one of the following cases:

1. The Legal assistance requests fail to comply with the international treaties, which the Socialist Republic of Vietnam has signed or acceded to, and the laws of the Socialist Republic of Vietnam;
2. The provision of legal assistance would be detrimental to the national sovereignty, security or other important interests of the Socialist Republic of Vietnam.

#### *Article 346: Receipt and Transfer of Documents, Objects and Money Related to Criminal Cases*

1. The receipt of documents related to criminal cases shall comply with the international treaties which the Socialist Republic of Vietnam has signed or acceded to, and the provisions of this Code.
2. The transfer of objects and money related to criminal cases out of the territory of the Socialist Republic of Vietnam shall comply with the laws of the Socialist Republic of Vietnam.

We can see that legal assistance provided by Vietnam heavily relies on treaties to which Vietnam is a Party. Article 341 makes clear that the provisions governing legal assistance are those contained in the treaties listed above. Article 342 sets out the grounds for refusal which are: i) failure to comply with the provisions in those international treaties. It is assumed that this includes all of the conditions for refusal in those treaties; and ii) a more general ground preserving national sovereignty, security and the rather vague catch all “other important interests”. Under article 346, the receipt of documents from other States must be compliant with the provisions in the treaties, but if objects or money is to be transferred out of Vietnam it must comply with Vietnamese law. The MLA provisions in the CPC are fairly vague. The general approach appears to be to protect Vietnamese sovereignty over processes that matter to it.



In 2007, Vietnam enacted a comprehensive law on Mutual Legal Assistance (MLA) in both criminal and civil matters.<sup>93</sup> It is the primary legislation for formal MLA in criminal matters but does not replace the aforementioned provisions of the CPC. Article 4 of the Law on MLA reads:

1. Mutual legal assistance shall be carried out on the principle of respect for each other's independence, sovereignty and national territorial integrity, non-interference in each other's internal affairs, equality and mutual benefit in accordance with the Constitution and law of Vietnam and international treaties to which Vietnam is a Party.
2. In case Vietnam and the foreign country has not yet signed or acceded to any international treaty concerning mutual legal assistance, legal assistance shall be performed on the principle of reciprocity, provided that this does not contradict Vietnamese laws and in compliance with international law and practice.

This article restates the fundamental principle that MLA is to be carried out by references to the contents of Vietnam's international treaty obligations (or where no treaty relations are in existence on the basis of reciprocity), but again the preservation of Vietnamese sovereignty over these processes is paramount.

#### *Kinds of assistance*

Article 17 of the Law on MLA provides for the types of legal assistance as following:

- a) Service of documents and other records related to a criminal case;
- b) Summons of witnesses, experts and persons who have rights and obligations in the case;
- c) Collection and provision of evidence;
- d) Criminal prosecution;
- e) Exchange of information; and
- f) Other forms of mutual legal assistance in criminal matters.

It can be seen that both the CPC and the Law on MLA focus on the provisions of assistance in collating evidence. It is not clear what article 17(f) of the Law on MLA is referring to when it speaks of "other forms of MLA". MLA for the purposes of taking of preliminary measures and confiscation of criminal assets, sharing of the confiscated assets and returning such assets has not been specified in the CPC and the Law on MLA, but may

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<sup>93</sup> Luật Tuong Tro Tu Phap [Law on Mutual Legal Assistance] (Vietnam) Law No. 08/2007/QH12, 21 November 2007, entered into force 1 July 2008.

come under article 17(f). Nonetheless, legal assistance for these purposes is provided for in the suppression conventions, the ASEAN Treaty on MLA in Criminal Matters, the treaties on MLA in criminal matters between Vietnam and India (2007)<sup>94</sup> and the UK.<sup>95</sup> It is worth noting that the Law on MLA was adopted after Vietnam ratified the 1988 Vienna Convention and the ASEAN Treaty on MLA in Criminal Matters. Under article 1(3) of the treaty between the UK and Vietnam, MLA in criminal matters includes, for example:

- a) Taking the testimony or statements of persons including by videoconference or television;
- b) Providing documents, records, and other evidentiary material;
- c) Serving documents;
- d) Locating or identifying persons where required as part of a wider request for evidence;
- e) Transferring persons in custody according to article 12 (Transfer of Persons in Custody);
- f) Executing requests for search and seizure;
- g) Identifying, tracing, restraining, seizing, confiscating and disposal of proceeds of crime and assistance in related proceedings;
- h) Return of assets;
- i) Sharing of assets in accordance with Chapter II;
- j) Such other assistance as may be agreed between the Central Authorities.

It appears from these obligations read as a whole that the international treaties are much more specific, while the domestic provisions tend to be broader and open-ended. The clause of “other forms of mutual legal assistance in criminal matters” will safeguard Vietnam against the international obligations, as it can be interpreted flexibly to include any type of MLA. It also implies that Vietnam is willing in principle to provide a broad range of assistance. However, the problem is that if the specific form of MLA is mentioned in an international instrument but not mentioned in a domestic law, the Vietnamese authorities may be reluctant in dealing with such form of MLA, because they are unsure whether it is included in “other forms”. As a result, Vietnam can show that it has adequate “law in the books”, but the quality of actual implementation would be poor.

In a more specific provision of types of MLA, article 47 of the Law on Prevention and Suppression of Money Laundering (Law on PSML) set out the categories of international cooperation in AML as follows:<sup>96</sup>

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<sup>94</sup> *Treaty between the Republic of India and the Socialist Republic of Vietnam on Mutual Legal Assistance in Criminal Matters*, signed in Hanoi on 8 October 2007.

<sup>95</sup> *Treaty between the UK and Vietnam on MLA in Criminal Matters*, above n72.

<sup>96</sup> *Law on Prevention and Suppression of Money Laundering*, above n76.

1. Exchanging information and documents related to anti-money laundering.
2. Identification and seizure of the property of persons who have committed money laundering crimes.
3. Mutual legal assistance and cooperation in the extradition of money laundering offenders.
4. Other forms of cooperation in anti-money laundering.

The adoption of this article reflects a progress of Vietnam in transforming international AMLs into its domestic laws. Nevertheless, again this article is vague and an open-ended clause is added at the end of the article. Legal assistance in retrieving criminal assets is provided for in this article but is confined to only provisional measures imposed on the assets of money laundering criminals. The use of “other forms” (in clause (4)) suggests that Vietnamese authorities may have not been familiar with, or even unknown, some forms of MLA (rather than what are listed in clause (1), (2) and (3)), such as confiscation of criminal assets or sharing confiscated criminal assets.

### *Procedure*

Article 23 of the Law on MLA provides that:

1. Within 15 days of receipt of a request for legal assistance in criminal matters from a foreign competent authority, the Supreme People’s Procuracy shall record it in the Register of Requests for legal assistance in criminal matters, check its validity and transmit it to the competent agency conducting criminal proceedings in Vietnam for execution. If the request is not valid, the Supreme People’s Procuracy shall return it to the competent authority of the requesting State and shall specify reasons therefore.
2. Within 5 working days of receipt of the document informing the results of request’s execution sent by the agency conducting criminal proceedings of Vietnam, the Supreme People’s Procuracy shall send it to the competent authority of the requesting State according to the international treaty to which Vietnam and that foreign State are Parties, or through the diplomatic channels.
3. If the request for legal assistance in criminal matters cannot be executed or cannot be executed within the time limit required by the foreign competent authority, or cannot be executed without additional conditions, the competent agency conducting criminal proceedings of Vietnam shall inform in writing the Supreme People’s Procuracy of the reasons therefore so that it may notify the competent authority of the requesting State.

The Supreme People’s Procuracy (SPP) is the Central Authority of Vietnam for making and receiving MLA requests in criminal matters. After receiving a request, the SPP will examine such request for approval before it is executed on a substantive level by the competent executing agency. The SPP chooses the “enforcing judgments” approach. In order

for the initial approval, the SPP requires the requesting State to provide its judgment, such as a confiscation order and its provisional measures (e.g., search, seizure and freezing), and the supporting documents.<sup>97</sup> The competent executing agency is normally the police force. Interestingly, although legal assistance in executing provisional measures and confiscation of criminal assets is not specified in article 17 of the Law on MLA, its procedure is provided for in article 19 of the law. However, the procedure and circumstances for the sharing of and returning of confiscated assets are not mentioned in any article of this law.

Most bilateral MLA treaties signed by Vietnam provide that the Central Authorities shall normally communicate directly with one another, but may, if they choose, communicate through the diplomatic channel.<sup>98</sup> The treaty between the UK and Vietnam (article 3(2)) requires the Central Authorities to communicate directly with one another. Furthermore, this treaty allows, in cases of urgency, MLA requests to be transmitted via INTERPOL.<sup>99</sup>

When there is no treaty on MLA between Vietnam and the requested State, the diplomatic channels are used. Accordingly, the competent authorities of the two States send the results of request's execution directly to one another, upon the principle of reciprocity.

Article 21(1) and (2) of the Law on MLA provides for grounds for refusal or postponement of the execution of a foreign legal assistance request:

1. A foreign request for legal assistance in criminal matters shall be refused in one of the following circumstances:
  - a) It is not in conformity with the obligations of Vietnam under the international treaties to which Vietnam is a party and Vietnamese laws;
  - b) The execution of the request may jeopardize the sovereignty or national security of Vietnam;
  - c) The request relates to the prosecution of a person for a criminal conduct for which that person has been convicted, acquitted or granted a reprieve in Vietnam;
  - d) The request relates to a criminal conduct for which the statute of limitations has elapsed according to the Penal Code of Vietnam;
  - e) The request relates to a criminal conduct which does not constitute a crime under the Penal Code of Vietnam.
2. The execution of a foreign request for legal assistance in criminal matters may be postponed if the execution of that request would cause an obstacle to the investigation, prosecution, trial, or the enforcement of a judgment in Vietnam.

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<sup>97</sup> *Law on Mutual Legal Assistance*, above n93, article 19.

<sup>98</sup> For example, see *Treaty between the Republic of Korea and the Socialist Republic of Vietnam on Mutual Legal Assistance in Criminal Matters*, signed at Seoul 15 September 2003, entered into force 19 April 2005, article 3(4); or *India - Vietnam Treaty on MLA in Criminal Matters*, above n94, article 3(4).

<sup>99</sup> *Treaty between the UK and Vietnam on MLA in Criminal Matters*, above n95, article 3(4).

Article 21(1)(a) of the Law on MLA implies that Vietnam will not provide more than it has already agreed to in a treaty. If the requesting State has not signed a treaty with Vietnam, the execution of the request depends on reciprocity subject to article 4(2) of the Law on MLA. The grounds for the refusal of MLA provided for in article 21(1)(b) and article 21(2) are similar to those in the suppression convention (e.g., in article 18(21)(b) and 18(25) of the Palermo Convention). As whether an MLA request jeopardises the sovereignty or other interests of Vietnam depends on Vietnam's interpretation of those interests, article 21(1)(b) could be serve as a "reasonable" reason for the refusal of MLA if Vietnam is not comfortable, for example, because of political or economic matters. Article 21(2) may also be used to simply delay provision of MLA by opening an investigation and never closing it.

#### *Conditions/principles*

Article 21(1)(c) of the Law on MLA indicates that Vietnam applies, *inter alia*, the principle of *ne bis in idem* to MLA requests related to the prosecution of a person. It is assumed that Vietnam will apply this condition to the request for confiscation of criminal proceeds.

According to article 21(1)(d) and (e) of the Law on MLA, Vietnam applies a strict condition of double criminality when granting all types of MLA in criminal matters. This application does not follow the international tendency whereby double criminality should not be required if the request does not involve coercive actions. Nevertheless, this condition is made optional and more relaxed in bilateral MLA treaties between Vietnam and other States. For example, under the MLA treaty between Vietnam and South Korea, Vietnam may refuse an MLA request if such request relates to the prosecution or punishment of a person for an offence for which the person could no longer be prosecuted by reason of the lapse of time; or for conduct that would not have constituted a crime in Vietnam.<sup>100</sup> It should be recalled here that when it comes to regulations on the same matter, if there is a difference between the relevant domestic legal documents and related treaty provisions to which Vietnam is a Party, the treaty provisions shall prevail. Despite that, as the double criminality condition is optional in both bilateral and multilateral treaties, it is likely that Vietnam will adopt this condition rigidly.

Vietnam does not bar requests for legal assistance in regard to tax evasion. Tax evasion constitutes a crime provided for in article 161 of the 1999 Penal Code if the offender evades

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<sup>100</sup> *Vietnam - South Korea Treaty on MLA in Criminal Matters*, above n98, article 5(2).

tax in the amount of over fifty million VND (about 2,500 US\$). Therefore, legal assistance related to a fiscal matter may be provided.

### *The law in action*

In the period from July 2008, when the Law on Mutual Legal Assistance came into force, to June 2010, the Supreme People's Procuracy of Vietnam made and sent 12 formal legal assistance requests to foreign authorities under the procedure provided for in the Law on MLA.<sup>101</sup> The majority requested assistance in evidence collection and investigation of Vietnamese citizens or foreigners who have committed crimes within Vietnam. In this time, the Supreme People's Procuracy of Vietnam received 156 requests for MLA in criminal matters from abroad, mainly from the Czech Republic, Poland, Hungary and China;<sup>102</sup> of which only one request was refused based on the ground provided for in article 21(1)(c) of the Law on Mutual Legal Assistance (*ne bis in idem*). Thirty six requests were executed and 107 requests were being considering for execution.<sup>103</sup> All these outgoing and incoming requests are made based on the relevant bilateral MLA treaties. Vietnam has not yet made or received any formal MLA request to or from an ASEAN MLA Treaty Party under such treaty.<sup>104</sup> The Supreme People's Procuracy of Vietnam has received a number of requests for freezing, seizing and confiscation of criminal proceeds located in Vietnam, but as yet not one of these requests has been executed. This is because there has not yet been specific legal provision of procedure made for MLA requests for confiscation of the criminal proceeds other than material evidence in Vietnamese laws.<sup>105</sup> As noted in chapter 6, Vietnamese authorities are allowed to impose some provisional measures for purposes of collating material evidence which can be the proceeds of crime in form of tangible things. However, these measures cannot be used for other criminal assets.

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<sup>101</sup> Interpol Vietnam (2011), *"Report on Result of International Cooperation in the Prevention and Suppression of Transnational Crime"* at 47.

<sup>102</sup> Vietnam has already signed the treaty on MLA with these States.

<sup>103</sup> See Interpol Vietnam (2011), above n101.

<sup>104</sup> Attorney General's Chambers of Malaysia (15 May 2012), "Statistic Database (ASEAN Treaty on Mutual Legal Assistance in Criminal Matters)", available at: [http://www.agc.gov.my/index.php?option=com\\_content&view=article&id=922&Itemid=395&lang=en](http://www.agc.gov.my/index.php?option=com_content&view=article&id=922&Itemid=395&lang=en) (accessed 5 August 2013).

<sup>105</sup> "Kien Nghi Sua Doi Bo Luat To Tung Hinh Su va Luat Tuong Tro Tu Phap De Tich Thu Tai San Pham Phap o Nuoc Ngoai [Suggested Amendment to Criminal Procedure Code and Law on Mutual Legal Assistance for Confiscation of the Criminal Property Located Abroad]" (2013), available at: [http://duthaoonline.quochoi.vn/DuThao/Lists/TT\\_TINLAPPHAP/View\\_Detail.aspx?ItemID=656](http://duthaoonline.quochoi.vn/DuThao/Lists/TT_TINLAPPHAP/View_Detail.aspx?ItemID=656) (accessed 11 July 2013).

### 7.7.3 *Comments and Suggestions*

Vietnam has joined the network of “police-to-police” assistance in AML and has established its own FIU-style department - the AMLD. Given the available institutions and legal framework, Vietnam appears to be compliant with the international standards on exchanging AML information through the less formal channels of “police-to-police” assistance and of the FIU network.

Vietnam has transformed the international standards on treaty-based MLA into the Law on MLA and Law on PSML, but insufficiently. The important provisions for MLA in the CPC, despite the deficiencies, have not been amended thus far. However, in general, the provisions for MLA made by the different laws (the CPC, the Law on MLA and the Law on PSML) cover most types of legal assistance in AML. These provisions, if being interpreted broadly, largely comply with the international standards on MLA in AML.

The significant loophole in the MLA legal framework of Vietnam is the lack of specific provisions for assistance in retrieving criminal assets. Although article 346 of the CPC can be applied to these types of MLA, it is necessary to have more specific provisions to enable Vietnam to succeed in claiming a share of the confiscated assets.

In addition, by requiring double criminality in all MLA requests, Vietnam does not follow either the FATF Recommendations<sup>106</sup> or the tendency of other States in MLA. Germany, for example, only requires strict double criminality for extradition. In regard to other forms of legal assistance, for instance in supporting other countries in investigation proceedings or the transnational execution of imposition of fines and confiscations, German law does not generally require double criminality. In principle, the existence of criminal proceedings in the requesting country is sufficient. The requirement of dual criminality is only expressly required for the seizure and surrender of property under sections 66 and 67 of the Act on International Cooperation in Criminal Matters<sup>107</sup> and some other prescribed circumstances.<sup>108</sup>

In order to remedy the current situation of Vietnam, this thesis suggests that:

i) Vietnam should dispense with the requirement of double criminality in all types of MLA. Article 21(1)(d) and (e) of the Law on MLA should be converted into optional grounds

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<sup>106</sup> FATF, above n1, R37.

<sup>107</sup> Act on International Cooperation in Criminal Matters (Germany), *as amended by 18 October 2010 (AICCM - Translated by by Prof. Dr. Michael Bohlander and Prof. Wolfgang Schomburg)*.

<sup>108</sup> FATF (2010), “Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism (Germany)”, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Germany%20full.pdf> (accessed 19 August 2013).

for the refusal of MLA only; and should specify the circumstances whereby double criminality can be relaxed, such as requests for bank records, business records or identification of the property. In regard to requests for seizure or freezing of the proceeds of crime, Vietnam should apply *in abstracto* double criminality (if double criminality is required). These changes will eliminate the differences between the Vietnam's laws on MLA and the MLA treaties to which Vietnam is a Party. MLA in anti-money laundering will be also enhanced.

ii) Article 17 of the Law on MLA, which provides for the scope of assistance, should be amended to specify all the types of MLA prescribed in article 1(2) of the ASEAN Treaty on MLA or article 1(3) of treaty on MLA between Vietnam and the UK, which includes the assistance in recovery of criminal assets. This amendment will make Vietnam's domestic laws consistent with the treaties to which Vietnam is a Party.

iii) The kinds of confiscated assets that Vietnam is prepared to share or return to foreign countries, and the procedure for that sharing or return should be specified in the Law on MLA. The confiscated assets should be returned to the requesting State in certain circumstances provided for in article 57(3) of the UNCAC, as pointed out earlier.

And iv) the AMLD should extend its cooperation with FIUs of other countries and consider becoming a member of the Egmont Group of FIUs. Being a member of the Egmont Group will enable the AMLD to exchange information related to money laundering to other foreign FIUs promptly. Furthermore, the AMLD can receive the training and sharing of expertise for the purposes of AML.

## **7.7 Conclusion**

MLA in criminal matters was traditionally sought through the diplomatic channel for the purposes of collating extraterritorial evidence in the investigation of a criminal case. The emergence of transnational crime has necessitated more types and diverse mechanisms of MLA. Legal assistance now includes the administrative exchange of information, the gathering of evidence and the recovery of assets extraterritorially. It can be processed through formal mechanism upon diplomatic customs or treaty-based MLA; or less formally based on the direct communication between interstate agencies. The interstate agencies assistance, of which "police-to-police" assistance is dominant, is likely to be more practical and efficient than formal legal assistance, at least in the early stages of investigation of a money laundering case.



In AML, the exchange of information through the FIU network is a “new” aspect of MLA, and the international coordination in confiscating criminal assets is a crucial type of MLA. The conditions/principles and basic procedure for the assistance in confiscation are provided for in the suppression conventions and the FATF Recommendations. The FATF recommends that States should render MLA in the absence of double criminality; and that if double criminality is required, it should be *in abstracto*. The transnational application of *ne bis in idem* can bar “double confiscation”. The cooperation in confiscation of the criminal proceeds or instrumentalities is normally based on bilateral or multilateral treaties. The procedures for this cooperation can be either by “transferring a request for confiscation” or by “execution of confiscation order”.

Vietnam has the fundamental institutional and legal framework for MLA in AML. The legal framework includes national laws, MOUs, bilateral and multilateral treaties. As set out in the national laws (the CPC, the Law on MLA and the Law on PSML), Vietnam can provide a wide coverage of legal assistance in AML, but it must comply with the international treaties and must preserve the national sovereign and interests. At first glance, the wording of the laws can make them as a whole compliant with international standards. However, the vague provisions of the laws will challenge Vietnamese law enforcement agencies in dealing with legal assistance requests in AML. For example, an unspecified provision of assistance in retrieving criminal assets, a crucial aspect of international cooperation in AML, has prevented Vietnamese authorities from processing a request for this purpose. It means that while the “paper” implementation of the international standards appears to be adequate, the actual implementation is still fairly weak.

## Chapter 8

### EXTRADITION FOR MONEY LAUNDERING OFFENCES

- 8.1 Introduction**
  - 8.2 Extradition in General**
    - 8.2.1 The Legal Basis*
    - 8.2.2 The Conditions*
    - 8.2.3 The Exceptions*
    - 8.2.4 Procedure and Obstacles*
  - 8.3 Extradition for Money Laundering Offences**
  - 8.4 The Vietnamese Law on Extradition**
    - 8.4.1 The Legal Basis*
    - 8.4.2 The Conditions*
    - 8.4.3 The Exceptions*
    - 8.4.4 Evidence and Procedure*
    - 8.4.5 Comments and Suggestions for Law Reform*
  - 8.5 Conclusion**
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### **8.1 Introduction**

Extradition has been recognized as a crucial pillar of international cooperation in combating transnational criminals, including transnational money launderers, who often try to escape from justice by crossing national borders.<sup>1</sup> Extradition serves two primary objectives: i) ensuring that criminals are not able to seek refuge in foreign States; and ii) at the same time, providing for due process and protection of certain State interests and individual rights.<sup>2</sup> In response to transnational money laundering, Vietnam may have to request the extradition of individuals who allegedly launder money in Vietnam and then flee abroad and of those who launder money from outside of Vietnam into or through Vietnam. Equally Vietnam must

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<sup>1</sup> The High Court of Australia recently commented that “[i]n a world of increased mobility, interactive technology and new forms of criminality, extradition represents an essential response to the characteristics of contemporary crime”. See *Foster v Minister for Customs & Justice* (2000), 200 CLR 442, 474.

<sup>2</sup> In *United States of America v Ferras*, the Canadian Supreme Court noted that extradition under a fair process will protect the comity between States and protect the individual rights of person to be extradited. See *United States v Ferras*, 2006 SCC 33, pars. 20, 21.

be prepared to respond to extradition requests from other States for alleged money launderers who have sought refuge in Vietnam.

This chapter will first examine the international standards on extradition in general, including the legal basis, conditions, exceptions and procedure, with a focus on extradition for transnational crime. This will be followed by the discussion of extradition for money laundering offences. Finally, the chapter will examine the Vietnamese legislation on extradition and its application to money laundering crimes and assess whether Vietnam is compliant with the international standards. Based on that examination and assessment, suggestions for law reform will be given.

## **8.2 Extradition in General**

### **8.2.1      *The Legal Basis***

The practice of extradition has a long history of development. It originated in ancient civilization as a matter of courtesy and goodwill between States.<sup>3</sup> Although different definitions for extradition have been given throughout its history,<sup>4</sup> it is generally understood as a formal process whereby the requested State surrenders to the requesting State a person present in the requested State accused of or convicted of an offence within the jurisdiction of the requesting State. The United Nations, in its Model Law on Extradition (2004), defines extradition as “the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence”.<sup>5</sup>

International law is silent on a general legal obligation to extradite. The primary legal bases for extradition include bilateral<sup>6</sup> or multilateral extradition treaties,<sup>7</sup> extradition

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<sup>3</sup> M Cherif Bassiouni, *International Extradition and World Public Order* (AW Sijthoff, 1974) at 1.

<sup>4</sup> Different definitions of extraditions were provided in I. A. Shearer, *Extradition in International Law* (Manchester University Press, 1971) at 21; *ibid*; and Clive Nicholls, et al., *Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Assistance* (3<sup>rd</sup> ed, Oxford University Press, 2013) at 3.

<sup>5</sup> *Model Law on Extradition* 2004, UNODC, section 1.

<sup>6</sup> Most States have at least one bilateral extradition treaty. Especially, the US has more than 100 bilateral extradition treaties.

<sup>7</sup> For example, *European Convention on Extradition*, 13 December 1957, ETS 24, entered into force 18 April 1960; and *Inter- American Convention on Extradition* 1981, 25 February 1981, entered into force 28 March 1992.

schemes<sup>8</sup> and national laws. In addition, as discussed further below, the suppression conventions (the Vienna Convention,<sup>9</sup> the Palermo Convention<sup>10</sup> and the UNCAC<sup>11</sup>) can become legal bases for extradition. In practice, bilateral treaty-based extradition has a long tradition and seems to be one of the most common bases for extradition. Some States, such as the US, require an applicable extradition treaty in force before extradition can take place.<sup>12</sup> A bilateral extradition treaty and domestic extradition law normally in combination provide the details in regard to extradition matters, such as the conditions, exceptions and procedure. Where no treaty exists, it is optional in certain States to extradite on the basis of their domestic laws and the principle of reciprocity for the sake of combating crime.<sup>13</sup> Extradition based solely on domestic law is also possible in certain States and may be the most popular way of carrying out this procedure in the future as States realize they cannot continually update extradition treaties.

In 1990, the UN recognized “the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions”; and the adoption of such a treaty serves as a guide to States in shaping their extradition relations.<sup>14</sup> Extradition provisions have also become an indispensable part of numerous UN suppression conventions, such as the 1988 Vienna Convention, the Palermo Convention and the UNCAC. These conventions all provide

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<sup>8</sup> For example, the London Scheme for Extradition within the Commonwealth governs the extradition of a person from one Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence. See “The London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002)”, available at: [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D\\_London\\_Scheme.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf) (accessed 12 July 2013), article 1(1).

<sup>9</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990, article 6.

<sup>10</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003, article 16.

<sup>11</sup> *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005, article 44.

<sup>12</sup> With few exceptions provided for in 18 USC § 3181(b), the US only grants an extradition request to a foreign country under an existing extradition treaty or convention between them. See 18 USC § 3181(a) and 3184 (2012).

<sup>13</sup> Some States, for instance Australia and the UK, can extradite a person in the absence of treaty and do not strictly require reciprocity (see E P Aughterson, *Extradition: Australian Law and Procedure* (The Law Book Company Limited, 1995) at 7-8). Others, for example Germany, may execute extradition without an existing treaty, however extradition is not permissible if reciprocity is not guaranteed. See *Act on International Cooperation in Criminal Matters (Germany), as amended by 18 October 2010 (AICCM - Translated by by Prof. Dr. Michael Bohlander and Prof. Wolfgang Schomburg)*, section 5.

<sup>14</sup> See Preamble of Model Treaty on Extradition [*Model Treaty on Extradition (1990)*] (United Nations) A/RES/45/116, 14 December 1990.

that “if a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this convention the legal basis for extradition in respect of any offence to which this article applies”.<sup>15</sup> In addition, article 16(5)(a) of the Palermo Convention and article 44(6)(a) of the UNCAC oblige their State Parties to inform, at the time of ratification, acceptance or approval or accession, the UN Secretary General whether they will take the convention as the legal basis for granting extradition to other States Parties. Some States, such as India and Mexico, have declared that they shall apply the Palermo Convention as a legal basis for extradition cooperation with other State Parties, with which there is no extradition treaty.<sup>16</sup> Moreover in practice, some States have granted an extradition request solely upon the legal basis of the Palermo Convention.<sup>17</sup> Other states, for instance Malaysia, Laos and importantly for the purposes of this chapter, Vietnam, have declared that they shall not take this convention as the direct legal basis for extradition.<sup>18</sup> These States may be sceptical about extradition relations, especially with other States which have different legal and political traditions. Hence, extradition based on a bilateral treaty or reciprocity seems to be preferred.

Relying upon various justifications, treaties and national laws impose conditions for extradition and exceptions for refusal. Individual and State’s interests can be protected by these conditions and exceptions. Each State usually applies the conditions and exceptions which serve its interests. The inclusion of the conditions and exceptions in an extradition treaty is a matter of negotiation and agreement between its State Parties. Thus, not all of these conditions and exceptions will be insisted upon by every State or found in every extradition

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<sup>15</sup> 1988 Vienna Convention, above n9, article 6(3); Palermo Convention, above n10, article 16(4); and UNCAC, above n11, article 44(5).

<sup>16</sup> United Nations, “Status of the United Nations Convention against Transnational Organized Crime (as at 15 July 2013)”, available at: <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf> (accessed 15 July 2013).

<sup>17</sup> For example, in 2009, the United Arab Emirates had extradited successfully a Serbian national, who was suspected of being involved in an armed robbery, from the Netherlands. See Conference of the Parties to the United Nations Convention against Transnational Organized Crime (Fifth Session), “*Catalogue of cases involving extradition, mutual legal assistance and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime, CTOC/COP/2010/CRP.5*” (22 September 2010) at 15, available at: [http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_CRP5/CTOC\\_COP\\_2010\\_CRP5\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_CRP5/CTOC_COP_2010_CRP5_E.pdf) (accessed 15 July 2013).

<sup>18</sup> United Nations, above n16.

treaty. This is why the suppression conventions subject extradition to the conditions provided for in the requested State's law or in applicable extradition treaties.<sup>19</sup>

### 8.2.2 *The Conditions*

#### *Extraditable offences*

As the extradition process is cumbersome and costly, not all criminal offenders should be subject to extradition. States normally agree on a category of offences which are sufficiently serious to warrant extradition. These offences, known as “extraditable offences”, are usually provided for in extradition treaties and national law.

Early extradition treaties and domestic extradition laws use the enumerative (or listing) approach to designate extraditable offences (e.g., Thailand-United Kingdom Extradition Treaty<sup>20</sup>). This approach has drawbacks, as the treaties and domestic laws are required to update emerging extraditable offences. The process of making supplementary treaties and municipal law amendments is often time-consuming. Additionally, this approach requires the application of double criminality *in concreto*.

Recent extradition treaties and municipal extradition laws employ the eliminative (or penalty-based) approach. Accordingly, extraditable offences are usually designated upon an applicable threshold term of imprisonment.<sup>21</sup> This approach still has its flaws. For example, countries may have significant disparities in their penalty policies and thus offences extraditable in one may not be extraditable in another.

By entering a suppression convention, the State Parties recognize the offences covered by that convention as extraditable offences. As a result, the State Parties are obliged to automatically update the scope of the extraditable offences in all existing extradition treaties between them to include the offences in that suppression convention.<sup>22</sup> It is noticeable that the Palermo Convention, the UNCAC and the FATF Recommendations do not provide a specific approach to the definition of extraditable offences. State Parties to the conventions

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<sup>19</sup> See article 6(5) of the Vienna Convention, article 16(7) of the Palermo Convention and article 44(8) of the UNCAC.

<sup>20</sup> *Treaty between the United Kingdom and Siam Respecting the extradition of Fugitive Criminals* Sign at Bangkok 4 March 1911, ratifications exchanged at London 11 August 1911, article 2.

<sup>21</sup> For example, under article 2(1) of the *Treaty on Extradition between the Republic of Korea and the Socialist Republic of Vietnam*, signed at Seoul 15 September 2003, entered into force 19 April 2005, the threshold is one year in prison. While under section 2(2) of the London Scheme for Extradition, the threshold is two years.

<sup>22</sup> See, for example, article 16(3) of the Palermo Convention.

and member countries of the FATF are left to choose their approach to the designation of extraditable offences. However, since the Palermo Convention applies the eliminative approach while the Vienna Convention and the UNCAC adopt the enumerative approach to extraditable offences, a State which is Party to all these conventions will have a “hybrid approach”.

### *Double criminality*

The double criminality condition, which is often found in treaties and national law on extradition, is perhaps the most fundamental condition for extradition. It requires that the offence for which extradition is sought must be a criminal offence in the domestic law of both the requesting and requested States. This condition should be satisfied at the time the offence was committed.<sup>23</sup> Double criminality preserves the legality principle, particularly to ensure reciprocal maintenance of the maxim *nullum crimen sine lege* (“no punishment without law”) in the context of extradition - “no one should be subject to a criminal process for something that is not a crime in the State they are in”.<sup>24</sup> However, as noted in chapter 5, this condition is not binding on States unless it is created in the applicable treaties or domestic laws. Thus, the condition cannot be employed as a bar to extradition if the applicable treaty or national law excludes it.<sup>25</sup> In some US extradition treaties, double criminality is not required for the return of a national of the requesting State.<sup>26</sup>

Article 16(1) of the Palermo Convention obliges its State Parties to grant extradition for the offences covered by the convention “provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party”. In fact, States tend to apply double criminality *in abstracto* in granting extradition.<sup>27</sup> The UN Model Law on Extradition (2004) states that double criminality is satisfied regardless of differences in denomination, categorization and the constituent elements of the compared offences.<sup>28</sup> In a similar vein, the UNCAC and FATF also call for

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<sup>23</sup> See S. Z Feller, “Significance of the Requirement of Double Criminality in the Law of Extradition ” (1975) 10 Israel Law Review 51 at 70; and *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No.3) 1999 WL 250052.

<sup>24</sup> Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford University Press, 2012) at 218.

<sup>25</sup> In *Factor v. Laubheimer*, 290 U.S. 276 (1933) 286-287, the Supreme Court of the US held that the double criminality condition is based not on international law but on treaty.

<sup>26</sup> For example, see article of 1(2)(b) of the *Treaty between the United States of America and the Federal Republic of Germany Concerning Extradition*, signed 20 June 1978, entered into force 29 August 1980.

<sup>27</sup> See *U.S. v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) 779-780; *U.S. v. Moss*, 344 F.Supp.2d 1142 (W.D.Tenn. 2004).

<sup>28</sup> *Model Law on Extradition*, above n5, section 3(3).

its State Parties and member countries to adopt double criminality (if required) *in abstracto* for extradition.<sup>29</sup>

The increased incidence of cross-border crimes has resulted in the application of double criminality becoming more complicated in many cases. For example, when a crime for which extradition is sought was committed outside the territory of the requesting State, the situation is especially complicated by what is sometimes called “jurisdictional double criminality”.<sup>30</sup> In such a situation, the requesting State has asserted extraterritorial jurisdiction over the crime to make the extradition request. If the requested State requires double criminality, it has to consider whether it has also established extraterritorial jurisdiction over a crime committed in similar circumstances in relation to it. Although the jurisdictional aspect of double criminality is not mentioned in extradition treaties and the suppression conventions, it is taken into account in practice. Therefore, as mentioned in chapter 5, the jurisdictional aspect should be included in the topic of double criminality *in abstracto*.

### *Evidence*

In the extradition process, the requested State, depending on the principles of its legal system, decides whether evidence for justification of extradition must be adduced by the requesting State, and if so, how much evidence is necessary.

Most civil law States regard extradition as a form of international assistance rather than a criminal process, thus they do not require any evidence be provided.<sup>31</sup> What these States require is that the requesting State has examined evidence appropriate under its law to lay a charge against the person sought and has issued an arrest warrant (in case of extradition for criminal prosecution). The requested State trusts that the requesting State has complied with the principles of due process of law.<sup>32</sup> It only needs a request accompanied with supporting documents.<sup>33</sup> Based on these documents, the requested State verifies whether the conditions for extradition have been met.<sup>34</sup>

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<sup>29</sup> UNCAC, above n11, article 43(2); and FATF (2012), “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations”, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 22 May 2014), R39.

<sup>30</sup> See *United States of America v Wong* [2001] 2NZLR 472.

<sup>31</sup> Boister, above n24, at 221.

<sup>32</sup> See, for example, the case of extradition of Yemeni citizens described in Matthias Hartwig, “The German Federal Constitutional Court and the Extradition of Alleged Terrorists to the United States ” (2004) 5(3) German Law Journal 185 at 194.

<sup>33</sup> For example, see section 10 of the *German AICCM*, above n13.

<sup>34</sup> *Ibid*, section 11.



Unlike civil law States, common law States consider extradition proceedings as quasi-criminal.<sup>35</sup> They require that some evidence implicating the alleged offender in the offence for which the extradition is requested be provided, to determine if it is sufficient to proceed with extradition. Traditionally, the standard of sufficiency in many common law States is that of a *prima facie* case.<sup>36</sup> Nevertheless, recently the UK has adopted the civil law standard of “no-evidence” for extradition cases with continental European States in compliance with the European Convention on Extradition. The UK only asks the requesting State to provide the warrant of arrest and relevant case summary.<sup>37</sup>

The US does not apply the *prima facie* case standard. The US requires a lower standard of evidence of “probable cause”, which is the same as evidence applicable to the issuance of a search warrant.<sup>38</sup> One of the purposes of extradition hearing is to determine whether “probable cause” exists to believe that the person sought committed an offence covered by the extradition treaty. A common check list for a hearing conducted in the US would include determinations that:<sup>39</sup>

1. There exists a valid extradition treaty between the United States and the requesting state;
2. The relator is the person sought;
3. The offense charged is extraditable;
4. The offense charged satisfies the requirement of double criminality;
5. There is “probable cause” to believe the relator committed the offense charged;
6. The documents required are presented in accordance with United States law, subject to any specific treaty requirements, translated and duly authenticated ... ; and
7. Other treaty requirements and statutory procedures are followed.

The suppression conventions oblige their State Parties, subject to their domestic law, to simplify evidentiary requirements and endeavour to expedite extradition procedures for any convention offence.<sup>40</sup>

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<sup>35</sup> Boister, above n24, at 221.

<sup>36</sup> See The London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002), above n8, paragraph 5(4)(a).

<sup>37</sup> See Extradition Act 2003 (The UK), section 2(6).

<sup>38</sup> Michael John Garcia and Charles Doyle, “*Extradition To and From the United States: Overview of the Law and Recent Treaties*” Congressional Research Service, 2010, at 21.

<sup>39</sup> Ibid, at 21.

<sup>40</sup> For example, article 16(8) of the Palermo Convention.

### *Rule of specialty*

The rule of specialty ensures that the requesting State does not prosecute and punish the person surrendered in a manner inconsistent with the terms on which extradition was granted. As extradition is subject to certain conditions and is granted on the specific extraditable offence for which the extradition is requested, the person sought should not be prosecuted for other non-extradition offences. This is the objective of the rule of specialty. In the *United States v. Rauscher*, the US Supreme Court explained the rule as follows:<sup>41</sup>

A person who has been brought within the jurisdiction of the court by virtue of the proceedings under an extradition treaty, can only be tried for those offences described in that treaty, and for the offence with which he is charged in the proceedings of his extradition, unless a reasonable time has been given him, after his release or trial upon such charge, to return to the country from whose asylum he has been forcibly taken under those proceedings.

Specialty can also be breached if a person extradited is re-extradited to a third State for an offence committed prior to his extradition without the requested party's consent.<sup>42</sup>

It should be noted that the rule is not a right of accused, but is, rather, a privilege of the asylum State by which its interests are protected.<sup>43</sup> The requested State has an interest in ensuring that its extradition proceedings are not abused by the requesting State for an ulterior purpose. The rights and interests of the fugitive in relation to speciality are derivative in nature. In addition, the rule may not be applied if it is not provided for in the applicable treaty or domestic law.<sup>44</sup>

It is also noteworthy that the application of the rule tends to be flexible. For example, the UN Model Treaty on Extradition suggests that "the rule of speciality is not applicable to extraditable offences provable on the same facts and carrying the same or a lesser penalty as the original offence for which extradition was requested".<sup>45</sup> National courts have been relaxed about applying specialty.<sup>46</sup> Accordingly, the rule of specialty does not require that defendant is prosecuted only under the precise indictment that prompted his extradition, or

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<sup>41</sup> *United States v. Rauscher*, 119 US 407 (1886), 430.

<sup>42</sup> See, for example, article 15 of *European Convention on Extradition*, above n7.

<sup>43</sup> *Berenguer v. Vance*, 473 F.Supp. 1195 (D.C.D.C. 1979).

<sup>44</sup> *U.S. v. Valencia-Trujillo*, 573 F.3d 1171 (11th Cir. 2009) 1181.

<sup>45</sup> UN Doc A/RES/52/88 (1998) ad to article 14 of *Model Treaty on Extradition (1990)*, above n

<sup>46</sup> In *Truong v. Queen*, 205 ALR 72, the Australian High Court held that specialty had not been violated when the accused extradited for conspiracy to kidnap and conspiracy to murder was actually convicted of murder and kidnapping.

that the prosecution always is limited to the specific offences enumerated in the requested State's extradition order.

### 8.2.3 *The Exceptions*

As noted earlier, some exceptions to extradition are found in most legal instruments related to extradition while others will vary in provision depending on particular extradition relations and national law. Further, not all grounds for the refusal of extradition have the same effect, some are mandatory whereas others are discretionary.

#### *Nationality exception*

While most civil law States refuse to extradite their nationals,<sup>47</sup> this is not the case in most common law States. Several extradition treaties provide an optional exception to extradition upon nationality.<sup>48</sup> The primary rationale behind the nationality exception to extradition has been believed to include that:<sup>49</sup> i) a person ought not to be withdrawn from his natural judges; and ii) a State owes its citizens the protection of its laws. The underlying justification appears to be a combination between a broad concept of national sovereignty and a concern in regard to the nature of the foreign trial that a national may face. Nevertheless, transnational criminals may abuse this exception to escape from the justice. Nationals of those States which apply the exception can commit crimes abroad with impunity if they either never leave their State of nationality or return to it before being arrested.

Because of the emergence of transnational crime, the international community and many States have taken steps to remove the strict application of nationality exception, or to prevent the impunity which may be created by this exception. The extradition treaty between the US and Italy (a civil law State) expressly states that extradition shall not be refused on the basis of nationality.<sup>50</sup> Article 16(2) of the Basic Law of German enables the extradition of Germans to another member State of the EU or to an international criminal court, provided that the rule of law is upheld. To prevent the impunity that the exception may bring to a fugitive, the suppression conventions bind their State Parties to apply the principle of *aut dedere aut*

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<sup>47</sup> For example, the extradition of German nationals is prohibited under article 16(2) of the Basic Law (2010).

<sup>48</sup> For example, article 6(1)(a) of the *European Convention on Extradition*, above n7; and article 4(a) of *Model Treaty on Extradition (1990)*, above n5.

<sup>49</sup> Shearer, above n4, at 118.

<sup>50</sup> See article IV of the *Treaty on Extradition between the United States of America and Italy*, signed 13 October 13 1983, entered into force 24 September 1984.

*judicare* (extradite or prosecute).<sup>51</sup> According to, for example article 16(10) of the Palermo Convention, the requested State Party that declines extradition upon the ground of nationality shall, at the request of the requesting State Party, submit the case immediately to its competent authorities for prosecution. The decision to prosecute and the prosecution must be conducted seriously. The State Parties concerned must cooperate with each other to ensure the efficiency of the prosecution.

In addition, the rationale of the exception can be still preserved by the alternative that the requested State allows extradition of its nationals upon the condition that they will be returned to it to serve their sentence. This alternative has been already provided for in the suppression conventions.<sup>52</sup> In a similar approach, in order to prevent the fugitive being immune from the punishment already imposed by the requesting State, the suppression conventions urge the requested State, if it refuses extradition upon nationality grounds, to consider the enforcement of that punishment itself.<sup>53</sup>

#### *Ne bis in idem*

As explained in chapter 5, *ne bis in idem* (or the prohibition of double jeopardy), a crucial principle in the exercise of jurisdiction over transnational crime, functions as a bar to new prosecution or enforcement of penalties for the same offender in both the national and transnational context. This principle is also reflected in extradition treaties and national laws,<sup>54</sup> which allows a State to refuse extradition if the person sought has been previously tried and convicted or acquitted in such State or in another State. Again, States vary in the interpretation and the application of this principle to extradition depending on specific treaty and domestic law. The principle can be applied narrowly to not only the same act but also to the same offence,<sup>55</sup> or more broadly to the same act or facts.<sup>56</sup>

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<sup>51</sup> How this principle works is explained in chapter 5.

<sup>52</sup> See for example, article 16(11) of the Palermo Convention.

<sup>53</sup> For example, article 16(12) of the Palermo Convention.

<sup>54</sup> See *European Convention on Extradition*, above n7, article 9.

<sup>55</sup> See article 8 of *Treaty between the United States of America and the Federal Republic of Germany Concerning Extradition*, signed 20 June 1978, entered into force 29 August 1980; and *Elcock v. U.S.*, 80 F.Supp.2d 70 (E.D.N.Y. 2000).

<sup>56</sup> See *Treaty on Extradition between the United States of America and Italy*, above n50, article 6; and *In re Gambino*, 421 F.Supp.2d 283 (D.Mass. 2006).

### *Discrimination ground*

An extradition request may be refused if the requested State has reasonable grounds for believing that the request has been made for the purposes of prosecuting or punishing the person sought on account of his race, religion, nationality or political opinions or that that person's position may be prejudiced for any of those reasons.<sup>57</sup> Discrimination is a discretionary ground for the refusal of extradition in the suppression conventions.<sup>58</sup>

### *Humanitarian grounds*

Extradition may be declined based on general humanitarian considerations of the circumstances of the fugitive. Under the London Scheme for Extradition, extradition may be refused if it would be unjust or oppressive or too severe a punishment to return the fugitive.<sup>59</sup> Some considerations can be the age or health of the person sought, or whether the punishment he would receive is disproportionate to the nature of the offence.

### *General human rights exception*

As noted in the specialty rule, fugitive's rights are mainly derived from the conditions and exceptions which are actually rights held by States. Thus, traditionally, fugitives were not eligible for challenging violations of extradition treaties, particularly the potential breach of their rights in the requesting State. However, several recent treaties have asserted the protection of human right as an independent condition in the extradition process and at trial in the requesting State.<sup>60</sup> The bar to extradition on the basis of general human rights ground has also been incorporated in domestic extradition laws.<sup>61</sup> These grounds can relate to various issues, such as the potential for facing an unfair trial, the possibility of torture, or inhuman or degrading treatment or punishment.<sup>62</sup>

### *Statute of limitations*

A less frequently recurring issue, arising by the requirement that the fugitive's act be considered criminal at the time extradition is requested, involves the statute of limitations of

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<sup>57</sup> See *European Convention on Extradition*, above n7, article 3(2).

<sup>58</sup> For example, see article 16(14) of the Palermo Convention.

<sup>59</sup> See article 15(2)(b) of The London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002), above n8.

<sup>60</sup> See, for example, article 16(13) of the Palermo Convention.

<sup>61</sup> See, for example, section 21 of the UK Extradition Act 2003.

<sup>62</sup> See article 3 of the European Convention on Human Right, 4 November 1950.

the requesting or requested State. Several extradition treaties of continental States require adherence to the statute of limitations in deciding whether extradition is granted. The statute of limitation may be examined under only the law of requested State<sup>63</sup> or the requesting State,<sup>64</sup> or both the States.<sup>65</sup>

#### *Fiscal offence exception*

It is noteworthy that there is a trend towards the relaxation of exceptions in various aspects of extradition for the aim of combating transnational crime. Historically, extradition treaties excluded those offences relating to taxation and fiscal matters from the category of extraditable offences, because the legislation of taxation is considered as an aspect of State sovereignty.<sup>66</sup> Nevertheless, in the era of globalization, tax-related offences and other financial offences, such as securities fraud or market manipulation, have had enormously detrimental effects on national and international economies.<sup>67</sup> Many States have criminalized some forms of serious infringement of tax law. Thus, there is no reason why States should not cooperate in the fight against fiscal-related offences as well as the fight against the laundering of their proceeds. The “fiscal offence” exception has been relaxed in a number of recent treaties on extradition. These offences are included in the scope of extraditable offences. For example, the Australia – Mexico treaty on extradition states that “extradition shall be granted for offences against laws relating to taxation, customs duties, foreign exchange control or other revenue matters where the acts or omissions constitute an extraditable offence against the laws of both Parties”.<sup>68</sup> Article 3(10) of the 1988 Vienna Convention, article 16(15) of the Palermo Convention and article 44(16) of the UNCAC also provides that State Parties may not refuse a request for extradition on the sole ground that the offence is considered to involve fiscal matters.

#### *Death penalty exception*

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<sup>63</sup> Article 8 of the *Extradition Treaty between the United States and France*, signed 6 January 1909, entered into force 27 June 1911; and see *President of the U.S. ex rel. Caputo v. Kelly*, 96 F.2d 787 (2nd Cir. 1938).

<sup>64</sup> Article 9 of the *The United States - Germany Treaty on Extradition*, above n55.

<sup>65</sup> Article 6(3) of the *Convention on Extradition between the Government of the United States of America and the Government of the State of Israel*, signed 10 December 1962, entered into force 5 December 1963.

<sup>66</sup> Gavan Griffith and Claire Harris, “Recent Developments in the Law of Extradition” (2005) 6(33) *Melbourne Journal of International Law* 33 at 35-36

<sup>67</sup> *Ibid.*, at 35.

<sup>68</sup> *Treaty on Extradition between Australia and the United Mexican States* 1991, article 4.

Pursuant to article 11 of the European Convention on Extradition, if the offence for which extradition is requested is punishable by death under the law of the requesting State, and if regarding such offence the death penalty is not provided for in the requested State or not normally carried out, extradition may be refused unless the requesting State can guarantee that the death penalty will not be carried out. This exception protects an aspect of human rights - the right to life.<sup>69</sup> Since the death penalty still exists in several States and is potentially imposed on some precursor transnational crimes to money laundering, such as drug trafficking or corruption, it could be a hindrance to extradition for such crimes and for money laundering itself. What is more, granting extradition on the condition that the requesting State will not impose the death penalty on the fugitive seems unfair in that the penalty imposed in the requesting State then depends on where the criminal was apprehended.

Other grounds for refusal can be that the offence for which the extradition is requested is a political offence<sup>70</sup> or military offence.<sup>71</sup> The details of these grounds are beyond the scope of this chapter which focuses mainly on extradition for money laundering offences.

#### **8.2.4      *The Procedure and Obstacles***

##### *Procedure*

The extradition process is initiated by a demand from law enforcement agencies in the requesting State for the extradition of a specified person who was charged with or convicted of a specified criminal offence. It normally goes through both the informal and formal phase, which may involve both the executive and judicial branches of government.

At the informal stage, the law enforcement agencies of the requesting State (e.g., police force) make contact with their counterparts in the requested State to seek the assistance in

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<sup>69</sup> See the United Nations (1948), "*The Universal Declaration of Human Rights* ", article 3.

<sup>70</sup> In 2006, the High Court of South Korea rejected a request for the extradition of *Chanh Huu Nguyen*, a Vietnamese dissident, upon the principle of non-extradition of political offence. Prior to the hearing, *Chanh* was arrested in Seoul at the request of Vietnam, which had accused him of attempting to bomb the Vietnamese Embassy in Bangkok (Thailand) and a statue of a national hero, Ho Chi Minh, in Vietnam. However, the court of South Korea has regarded him as a political dissident, not a terrorist, which is what he was being accused of by Vietnam. See "Seoul refuses to extradite political dissident to Vietnam" (2007), available at: <http://www.asianews.it/news-en/Seoul-refuses-to-extradite-political-dissident-to-Vietnam-6819.html> (accessed 18 July 2013).

<sup>71</sup> See *Treaty between Australia and the Socialist Republic of Vietnam on Extradition*, signed at Canberra on 10 April 2012, entered into force 7 April 2014, article 3(2)(a) and (b).

gathering more information about the person sought. INTERPOL can play a significant role in dealing with requests for information and assistance from police forces that have no established mechanisms for making contact. For example, INTERPOL's "Red Notices",<sup>72</sup> which contain details of the arrest warrant, a description of the fugitive and the offence committed, are used to identify and locate the fugitives. If a police force finds the fugitives, it will be asked to provisionally arrest them prior to receipt of a formal extradition request. These notices are circulated among all national INTERPOL agencies. The Secretary General of INTERPOL will deny a request for circulation if there are grounds to believe that the fugitive is wanted for political, military, racial or religious purposes.<sup>73</sup> They also assure that arrest will be followed by a formal request of extradition.

The formal stage, usually set out by the extradition treaty between the States involved,<sup>74</sup> begins by the submission of an extradition request in writing from a law enforcement agency in the requesting State through the diplomatic channel (or other means of communication arranged between two or more States<sup>75</sup>). Such a request will be accompanied by sufficient evidence (or supporting documents) to convince the competent authority<sup>76</sup> and court of the requested State that it is rational to arrest the fugitive offender and hold an extradition hearing (if required). In case of urgency, the competent authority of the requested State may request the provisional arrest of the person sought pending the presentation of the extradition request.<sup>77</sup> Then, the competent authority and court of the requested State considers whether the request meets the conditions for extradition.<sup>78</sup> If the court agrees that extradition can take place, it is left to the executive to make its own decision on whether to confirm or refuse extradition. It should be noted that the status of the court and the precise procedure may be designated differently under domestic law, and the decision of extradition depends much on political willingness.

Some countries have agreed to simplify the extradition process in certain circumstances. For instance, article 10 of the Korea-Vietnam Extradition Treaty provides that "when a

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<sup>72</sup> Interpol, "Notices", available at: <http://www.interpol.int/INTERPOL-expertise/Notices> (accessed 15 July 2013).

<sup>73</sup> See article 3 of the INTERPOL's Constitution (1956).

<sup>74</sup> See for example, *European Convention on Extradition*, above n7, articles 12 and 13.

<sup>75</sup> Ibid, article 12(1).

<sup>76</sup> For example, in the UK, under the Extradition Act 1989 (s7), the Secretary of State will decide whether to allow proceedings on a formal extradition request to commence. However, under the Extradition Act 2003, the Secretary of State's authority is limited at the beginning of the extradition process.

<sup>77</sup> *South Korea-Vietnam Extradition Treaty*, above n27, article 9.

<sup>78</sup> In most States, it is an appropriate court which will hold extradition hearing to determine the fugitive's susceptibility to surrender.



person sought advises a court or other competent authorities of the Requested Party that the person consents to an order for extradition being made, the Requested Party shall take all necessary measures to expedite the extradition to the extent permitted under its laws". The FATF also recommends that "consistent with fundamental principles of domestic law, countries should have simplified extradition mechanisms, such as allowing direct transmission of requests for provisional arrests between appropriate authorities, extraditing persons based only on warrants of arrests or judgments, or introducing a simplified extradition of consenting persons who waive formal extradition proceedings".<sup>79</sup>

### *Obstacles*

In practice, numerous common problems have hindered the effectiveness of extradition. They include:<sup>80</sup> weak/outdated extradition laws and treaties; different conditions and procedures for granting extradition; length, complexity, cost and uncertainty of extradition process; lack of awareness of national/ international extradition law and practice; language barriers; prejudice to an extradition request arising from premature arrest; burdensome evidentiary requirements of the requested State that are not familiar to or well understood by the requesting State; different approaches to exceptions; lack of trust among States about the integrity of each other's justice systems; delaying tactics, such as frivolous or irrelevant defence requests for further information; privileges and immunities, such as diplomatic immunity or asylum; partial, repeated or uncoordinated appeals throughout the extradition process; and problems arising in transit States.

The difficulties of extradition may lead national law enforcement authorities to employ various forms of irregular rendition to secure the return of a person to face prosecution or serve a sentence, such as: kidnapping/abduction,<sup>81</sup> luring/trickery<sup>82</sup> and deportation.<sup>83</sup>

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<sup>79</sup> FATF, above n29, R39.

<sup>80</sup> UNODC (2004), *"Informal Expert Working Group on Effective Extradition Casework Practice"* at 6-7.

<sup>81</sup> See *US v. Alvarez-Machain*, 504 US 655 (1992). In this case, the fugitive is a Mexican national who had been forcibly kidnapped from his home in Mexico and brought to the US to stand trial for crimes in connection with the kidnapping and murder of a US Drug Enforcement Administration (DEA) agent and his pilot. A majority of the US Supreme Court held that the forcible abduction of the fugitive does not prohibit his trial in a US court for violations of the country's criminal laws, regardless of the existing extradition treaty between the US and Mexico, and the strong protests of the Mexican government.

<sup>82</sup> In *R. v Secretary of State for the Home Department Ex p. Schmidt*, a German national living in Ireland accused of drug offences by the German prosecuting authority, who requested his return, was tricked by an officer of the Metropolitan Police extradition squad coming to London. Once in England, he was arrested and committed to custody pending his extradition. See [1994] 3 WLR 228.

<sup>83</sup> In *Mohamed and Another v President of the Republic of South Africa and Others*, 2001 (3) SA 893 (CC), under the collaboration between the South African and US officials, the appellant was deported from the

However, these forms of rendition may lack legitimacy and even violate the sovereignty, integrity of the asylum State or human rights. The courts of some States do not accept these forms of rendition. For instance, in *R v Horseferry Road Magistrates' Court, ex parte Bennett*, the House of Lords held that “where a defendant in a criminal matter had been brought back to the UK in disregard of available extradition process and in breach of international law and the laws of the State where the defendant had been found, the courts in the UK should take cognisance of those circumstances and refuse to try the defendant”.<sup>84</sup>

### 8.3 Extradition for Money Laundering Offences

At the international level, money laundering offences were initially categorized as extraditable offences in the 1988 Vienna Convention.<sup>85</sup> Then, in 1996, the FATF recommended that each member country should recognize money laundering offences as extraditable offences, and should constructively and effectively execute extradition requests in relation to money laundering.<sup>86</sup> The 2012 FATF Recommendations set out a comprehensive recommendation about extradition in relation to money laundering and terrorist financing offences.<sup>87</sup> The FATF recommends that countries should ensure money laundering offences are extraditable offences and apply certain conditions, principles and procedures for extradition related to money laundering offences. These issues are almost the same as for other extraditable offences, such as extradition of nationals, the condition of dual criminality, and the simplification of extradition mechanisms.<sup>88</sup> At the national level, many States are working to ensure that money laundering offences are extraditable offences in their national laws and bilateral treaties on extradition. The Anti-Money Laundering Act 2001 of Philippines, for example, stipulates that “the Philippines shall negotiate for the inclusion of money laundering offenses as herein defined among extraditable offences in all future treaties”.<sup>89</sup>

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South Africa to the US to face terrorism charges. See more *Bembenek v. Canada (Minister of Employment & Immigration)* (1991), 69 C.C.C. (3d) 34.

<sup>84</sup> *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 A.C. 42, 42.

<sup>85</sup> 1988 Vienna Convention, above n9, article 6 (2).

<sup>86</sup> FATF (1996), “The Forty Recommendations”, available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201996.pdf> (accessed 24 May 2013), R40.

<sup>87</sup> FATF, above n29, R39.

<sup>88</sup> Ibid.

<sup>89</sup> See section 13(g) of An Act Defining the Crime of Money Laundering, Providing Penalties therefor and for other Purposes (Philippines) Republic Act No. 9160, 2001

Apart from the general obstacles to extradition of transnational criminals identified previously, further problems may occur in case of cross-border money laundering. The distinction between national categories of extraditable predicate offences may cause controversies when the double criminality condition is applied. Let us assume, for example, that after committing a money laundering offence in State A, Mr X moved to reside in State B. State A seeks extradition of Mr X from State B for trial in State A for money laundering relying upon their bilateral extradition treaty. Some problems may arise in this case. For example, whether there is a violation of the double criminality condition if, for example, State A criminalizes money laundering from a specified predicate offence but State B does not criminalize money laundering from that predicate offence.<sup>90</sup> Moreover, will there be a violation of the double criminality condition in the jurisdictional sense if State A criminalizes money laundering from predicate offences that occur abroad when State B does not? With regard to extradition for money laundering offences, as recommended by the FATF,<sup>91</sup> double criminality of the money laundering offence, if required, should be *in abstracto*, provided that double criminality *in abstracto* (including the jurisdictional dimension) of the predicate crime is met. Further, although the FATF does not recommend this, the requesting State can prosecute the predicate crime as a non-extraditable crime in addition to the prosecution for the money laundering offence, if the applicable treaty allows it to do so.

Speciality may also cause a problem. The question may arise, for example of whether there is a violation of the specialty rule if State B grants extradition for money laundering offence to State A, and then State A prosecutes Mr X for both the money laundering offence on the grounds of which the extradition was granted and for its predicate offence (which was not an extraditable offence).<sup>92</sup> It is also an open question whether the principle of specialty is violated when the offender is subject to a criminal confiscation order in State A even if State

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<sup>90</sup> See *U.S. v. Anderson*, 472 F.3d 662 (9th Cir. 2006). At the time of proceedings, under law of Costa Rica, money laundering was criminal offence only if the laundered money was derived from drug trafficking, thus double criminality did not exist for money laundering offences. The US request of extradition related to money laundering charges was refused.

<sup>91</sup> R39 of FATF, above n29.

<sup>92</sup> In *U.S. v. Saccoccia*, above n27, the court ruled that an offence which itself is not extraditable can serve as a predicate act in connection with another extraditable offences, and that prosecution for offences other than the extradition offence does not violate the rule of specialty. Since the rule is grounded in international comity rather than in some right of the fugitive, specialty may be waived by the asylum State. The rule of specialty does not impose any limitation on the particular charges laid by the requesting State

B does not issue criminal confiscation order under comparable circumstances.<sup>93</sup> As noted earlier, the specialty rule, like the double criminality condition, is not supposed to be a hidebound dogma, but should be applied in a practical fashion. Specialty is not violated if the requesting State imposes a criminal confiscation order while it is not applicable to an equivalent situation in the requested State.

The other general exceptions to extradition, which are described above, are applied equally to money laundering offences.

## **8.4 The Vietnamese Law on Extradition**

The chapter now turns to the examination of Vietnamese law on extradition in general and extradition of offenders for money laundering in particular. Suggestions are then made for law reform in order to obtain greater compliance with the international AMLSs with regard to extradition matters.

### **8.4.1 General Legal Framework**

#### *International treaties*

As of April 2014, Vietnam has entered into bilateral treaties on extradition with South Korea,<sup>94</sup> Algeria,<sup>95</sup> India<sup>96</sup> and Australia,<sup>97</sup> of which the treaties with South Korea, India and Australia have taken effect. In addition, an extradition provision is embodied in mutual legal assistance (MLA) treaties between Vietnam and the Czech Republic,<sup>98</sup> Cuba,<sup>99</sup> Hungary,<sup>100</sup>

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<sup>93</sup> In *ibid*, the court held that the offender was properly subject to a forfeiture order even if he was not extradited on forfeiture charges and even if Swiss law did not provide criminal confiscation order under comparable circumstances.

<sup>94</sup> *South Korea-Vietnam Extradition Treaty*, above n21.

<sup>95</sup> *Treaty between the People's Democratic Republic of Algeria and the Socialist Republic of Vietnam on Extradition*, signed 14 April 2010.

<sup>96</sup> *Treaty between the Republic of India and the Socialist Republic of Vietnam on Extradition*, signed 13 October 2011, entered into force 12 August 2013.

<sup>97</sup> *Australia - Vietnam Extradition Treaty*, above n71.

<sup>98</sup> *Treaty between the Czechoslovakia Republic and the Socialist Republic of Vietnam on Mutual Legal Assistance in Civil and Criminal Matters*, signed 12 October 1982, entered into force 16 April 1984

<sup>99</sup> *Treaty between the Republic of Cuba and the Socialist Republic of Vietnam on Mutual Legal Assistance Civil, Family, Labour and Criminal Matters*, signed 30 November 1984.

<sup>100</sup> *Treaty between Hungary and the Socialist Republic of Vietnam on Mutual Legal Assistance Civil, Family and Criminal Matters*, signed 18 January 1985.

Bulgaria,<sup>101</sup> Poland,<sup>102</sup> Laos,<sup>103</sup> Russia,<sup>104</sup> Ukraine,<sup>105</sup> Mongolia,<sup>106</sup> and Belarus.<sup>107</sup> Vietnam is a Party to the 1988 Vienna Convention, the Palermo Convention, the UNCAC and the ASEAN Convention on Counter Terrorism.<sup>108</sup> It is important to note that money laundering and the main predicate offences (drug crimes, corruption and organized crimes) are extraditable under these conventions.

However, under the Vietnamese legal system, after Vietnam has ratified an international treaty, that treaty is not automatically incorporated wholesale into domestic law.<sup>109</sup> Further, Vietnam has expressed a reservation to article 6 of the 1988 Vienna Convention which regulates numerous aspects of extradition for drug-related crimes, and has made a declaration to the effect that it does not take article 16 of the Palermo Convention as a direct legal basis for extradition. It appears that Vietnam is generally wary of extradition, so bilateral treaty-based extradition would be Vietnam's preference. As noted earlier, the practice of extradition depends heavily on goodwill in State relations. By negotiating bilaterally, Vietnam is able to resolve obstructions in extradition relations with other States which have different legal and political traditions.

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<sup>101</sup> *Treaty between Bulgaria and the Socialist Republic of Vietnam on Mutual Legal Assistance in Civil, Family and Criminal Matters*, signed 3 October 1986.

<sup>102</sup> *Treaty between Poland and the Socialist Republic of Vietnam on Mutual Legal Assistance in Civil, Family and Criminal Matters*, signed 22 March 1993, entered into force 18 January 1995.

<sup>103</sup> *Treaty between the Lao People's Democratic Republic and the Socialist Republic of Vietnam on Mutual Legal Assistance in Civil and Criminal Matters*, signed 6 July 1998, entered into force 19 February 2000.

<sup>104</sup> *Treaty between the Socialist Republic of Vietnam and the Russian Federation on Mutual Legal Assistance in Civil and Criminal Matters*, signed 25 August 1998, entered into force 27 August 2012.

<sup>105</sup> *Treaty between the Socialist Republic of Vietnam and Ukraine on Mutual Legal Assistance in Civil and Criminal Matters*, signed 6 April 2000, entered into force 19 August 2002.

<sup>106</sup> *Treaty between the Socialist Republic of Vietnam and Mongolia on Mutual Legal Assistance in Civil, Family and Criminal Matters*, signed 17 April 2000, entered into force 13 June 2002.

<sup>107</sup> *Treaty between the Socialist Republic of Vietnam and the Republic of Belarus on Mutual Legal Assistance in Civil, Family, Labour and Criminal Matters*, signed 14 September 2000, entered into force 18 October 2001.

<sup>108</sup> *2007 ASEAN Convention on Counter Terrorism*, adopted by the Heads of State/Government of ASEAN member States at the 12th ASEAN Summit in Cebu, Philippines on 13 January 2007. Vietnam ratified this convention in 2010. The convention has come into force since 27 May 2011, 30 days after six out of ten member States had ratified (according to article XXI). The extradition provision for terrorism-related offences is provided in article VIII.

<sup>109</sup> The status of treaties in Vietnamese legal system was illustrated in chapter 3.

### *National extradition laws*

The national law on extradition of Vietnam was first codified in articles 343 and 344 of the Criminal Procedure Code (2003).<sup>110</sup> Article 343 of the Criminal Procedure Code (2003) provides that:

#### *Article 343: Extradition for prosecution or enforcing a criminal judgment*

Pursuant to international treaties to which the Socialist Republic of Viet Nam is a State Party or to the principle of reciprocity, the Vietnamese authorized bodies in criminal proceedings can:

1. Lodge a request to their foreign counterparts for extraditing a person who committed an offence or was convicted with an enforceable criminal judgment to the Socialist Republic of Viet Nam for prosecution or enforcing punishment;
2. Extradite a foreigner who committed an offence or was convicted with an enforceable criminal judgment in the territory of the Socialist Republic of Viet Nam to the requesting State for prosecution or enforcing punishment.

#### *Article 344: Refusal of extradition*

1. The Vietnamese authorized bodies in criminal proceedings shall refuse extradition in one of the following circumstances:
  - a) The sought person is a citizen of the Socialist Republic of Viet Nam;
  - b) According to the law of the Socialist Republic of Viet Nam, the sought person has become immune from prosecution or punishment by reason of lapse of time or other legal reasons;
  - c) The sought person has been convicted by a court of the Socialist Republic of Viet Nam with an enforceable judgment of the offence for which extradition is requested, or if the case is suspended as provided for in this Code;
  - d) The sought person is residing in Viet Nam by the reason of possible persecution by the requesting State due to discrimination on the ground of race, religion, nationality, ethnic origin, social class and political opinion.
2. The extradition request may be refused in one of the following circumstances:
  - a) According to the criminal law of the Socialist Republic of Viet Nam, the offence for which the extradition is requested is not criminalized;
  - b) The sought person is being prosecuted in Viet Nam for the offence for which the extradition is requested.
3. The authorized body in criminal proceedings of the Socialist Republic of Viet Nam that has refused extradition according to paragraph (1), (2) of this article shall notify their foreign counterparts of the decision on extradition refusal.

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<sup>110</sup> Bo Luật Tố Tụng Hình Sự [*Criminal Procedure Code*] (Vietnam) Law No. 19/2003/QH11, 26 November 2003, entered into force 1 July 2004.

We can see that article 343 provides simply the power to make extradition requests for any alleged offender no matter what nationality, and to receive extradition requests for non-Vietnamese nationals. Article 343 stipulates the grounds on which Vietnam shall or may refuse an extradition request (those grounds will be discussed in detail later). Nevertheless, these articles do not provide the procedural aspects of extradition (these are discussed further below). In 2007, the legal framework for extradition was supplemented by articles 32 to 48 of the Law on Mutual Legal Assistance (2007).<sup>111</sup> In 2013, extradition of money laundering offenders was provided for in the Law on Prevention and Suppression of Money Laundering as one aspect of international cooperation in AML.<sup>112</sup>

Together, these national laws and Vietnam's bilateral extradition treaties (or MLA treaties which include extradition provision) are the primary legal basis for extradition. In fact, Vietnam relies on treaties or reciprocity to proceed with extradition.

#### **8.4.2      *The Conditions***

##### *Extraditable crimes and the double criminality condition*

Article 33(1) of the Law on Mutual Legal Assistance (Law on MLA) defines extraditable crimes as crimes punishable under the criminal laws of both Vietnam and the requesting State by imprisonment for a period of at least one year, for life imprisonment, or for the death penalty. In addition, those who have been sentenced by the court of the requesting State to imprisonment and the remaining term of imprisonment to be served is at least six months may also be subject to extradition.<sup>113</sup> Vietnam adopts the eliminative approach to categorizing extraditable crimes in all its bilateral treaties on extradition listed above. The punishment threshold applied to extraditable offences in the treaties is one year of imprisonment. Under article 251 of the Amendment to the 1999 Penal Code where the criminalization of money laundering is provided for,<sup>114</sup> the money laundering crime is a crime punishable by at least one year imprisonment, thus it is an extraditable crime. Thus,

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<sup>111</sup> Luật Tuong Tro Tu Phap [Law on Mutual Legal Assistance] (Vietnam) Law No. 08/2007/QH12, 21 November 2007, entered into force 1 July 2008.

<sup>112</sup> Luật Phong, Chong Rua Tien [Law on Prevention and Suppression of Money Laundering] (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013, article 47(3).

<sup>113</sup> *Law on Mutual Legal Assistance*, above n111, article 33(1).

<sup>114</sup> Luật Sua Doi, Bo Sung Mot So Dieu Cua Bo Luật Hinh Su [Law Amending and Supplementing to a Number of Articles of the Penal Code] (Vietnam) Law No. 37/2009/QH12, 19 June 2009, entered into force 1 January 2010, article 251.

after the criminalization, money laundering crimes are included automatically in Vietnam's existing bilateral treaties on extradition.

Under article 33(1) and (2) of the Law on MLA and all the bilateral extradition treaties of Vietnam, double criminality is rigidly required and it is applied *in abstracto*. This complies with the international provisions. Interestingly, article 2(1) of the Vietnam - South Korea extradition treaty requires double criminality at the time of the request. Article 33(2) of the Law on MLA states that it shall not matter whether the laws of both Vietnam and the requesting State place the conduct, for which the extradition is requested, within the same category of crime or denominate the crime by the same terminology.<sup>115</sup> Finally, while article 6(b) of the Vietnam - Australia extradition treaty requires that the conduct of which extradition is sought constituted an offence in the requesting State at the time it occurred, and the conduct would have constituted an offence in the requested State at the time of the request.

Article 33(3) of the Law on MLA and some bilateral treaties do specify the jurisdictional dimension of extraditable offences when providing that conduct committed outside the territory of the requesting State can be deemed extraditable if that conduct constitutes a crime under the Penal Code of Vietnam. If such conduct is not punished under the law of Vietnam, Vietnam, in its discretion, may grant extradition.<sup>116</sup>

As noted in chapter 5, Vietnam does not state clearly whether the predicate crimes for money laundering include crimes committed abroad. Furthermore, Vietnam's authorities appear to be hesitant to claim and execute extraterritorial jurisdiction, especially in case of transnational money laundering, because of lack of both the legal basis and resources. This may serve as a basis for Vietnam to refuse extradition for money laundering crimes which results from predicate crimes that occur abroad.

#### *Rule of specialty*

Article 34 of the Law on MLA sets out the rule of specialty for extradition to and from Vietnam. It provides that a person extradited to Vietnam shall not be prosecuted for any crime committed before the extradition which is not described in the extradition request, and that such person shall not be extradited to a third State. Additionally, Vietnam will proceed with the extradition process on the condition that the requested State assures that the person

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<sup>115</sup> *Law on Mutual Legal Assistance*, above n111, article 33(2).

<sup>116</sup> See for example, article 2(6) of the South Korea – Vietnam extradition treaty.



sought will not be prosecuted for any crime other than crimes for which extradition is requested, unless there is a written consent of Vietnam. However, article 15(1) of the Vietnam - South Korea extradition treaty enables the requesting State to detain, try or punish a person extradited for a differently denominated offence based on the same facts on which extradition was granted, provided that such offence is extraditable or is a lesser included offence. Article 15(2) of this treaty also allows extradition to a third State if the requested State consents. It means that in its bilateral treaties on extradition, Vietnam does not apply the specialty rule in a narrow sense. This is in line with the international tendency.

According to the extradition treaties signed by Vietnam, it is likely that Vietnam will not prosecute a returned fugitive for both money laundering and its predicate crime, unless these crimes are based on the same facts and the predicate crime is also extraditable or carries a lesser penalty.

#### **8.4.3      *The Exceptions***

##### *Nationality ground*

Article 344(1) of the Criminal Procedure Code (CPC) and article 35(1) of the Law on MLA provide that Vietnam shall refuse extradition if the person sought is its citizen. This provision has also been incorporated in all bilateral extradition treaties of Vietnam. However, only the recent treaties, such as with South Korea or Australia, stipulate that if extradition is declined solely on the nationality basis, the requested State must, at the request of the requesting State submit the case to its authorities for prosecution.<sup>117</sup> Neither the older treaties nor national law of Vietnam provide the principle of *aut dedere aut judicare*. Therefore, Vietnam may prosecute its nationals for money laundering committed in South Korea or in Australia if it refuses their extraditions, but it is unlikely to do so when the money laundering crime occurred in other countries, which must be considered a loophole. Other alternatives provided for by the suppression conventions, such as extraditing on condition of return for sentence are not also referred to in the Vietnamese laws.

##### *Ne bis in idem*

Under the article 344(1)(c) of the CPC and article 35(1)(c) of the Law on MLA, Vietnam shall refuse extradition if the person sought has been convicted or acquitted by the final

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<sup>117</sup> See *South Korea-Vietnam Extradition Treaty*, above n21, article 6(2).

judgment of a Vietnamese court of the crime for which the extradition is requested. The *ne bis in idem* exception has been embedded in all of Vietnam's bilateral extradition treaties. Vietnam applies this exception broadly to the same actions. In addition, Vietnam may refuse extradition if the fugitive is subject to ongoing criminal proceedings in Vietnam for the crime for which the extradition is requested.<sup>118</sup>

#### *Statute of limitation*

The lapse of time is provided for as a mandatory refusal of extradition in national laws and bilateral treaties of Vietnam. The lapse of time is tested under the law of the requested State<sup>119</sup> or the requesting State.<sup>120</sup> Under article 23(c) of the Penal Code of Vietnam, the statute of limitation for very serious crimes (*"toi rat nghiêm trọng"*), among them are money laundering crimes, is 15 years.

#### *Humanitarian grounds*

Humanitarian grounds for the refusal of extradition are not reflected in national law and in many extradition treaties of Vietnam. They are only stated in the recent bilateral extradition treaties. For example, article 4(3) of the South Korea - Vietnam extradition treaty provides that extradition may be refused if "the Requested Party while also taking into account the seriousness of the offence and the interests of the Requesting Party deems that, because of the personal circumstances of the person sought, the extradition would be incompatible with humanitarian considerations".

#### *General human rights exception*

Neither national law nor the older extradition treaties provide that general human rights may serve as grounds for the refusal of extradition. However, the Vietnam - Australia extradition treaty stipulates that extradition shall be refused if the requested State has substantial grounds for believing that "a request for extradition for an ordinary criminal offence has been made for purpose of prosecuting or punishing a person on account of that person's race, ethnic origin, gender, language, religion, nationality, political opinion or other

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<sup>118</sup> *Criminal Procedure Code*, above n110, article 344(2); and *Law on Mutual Legal Assistance*, above n111, article 35(2).

<sup>119</sup> *South Korea-Vietnam Extradition Treaty*, above n21, article 3(1)(c).

<sup>120</sup> *Australia - Vietnam Extradition Treaty*, above n97, article 3(1)(c).

status, or that that person's position may be prejudiced for any of those reasons”; or that “the person whose extradition is sought would be subjected in the requesting State to torture”.<sup>121</sup>

It is worth noting that Vietnam has signed but not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>122</sup> Vietnam has ratified the International Covenant on Civil and Political Rights<sup>123</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>124</sup> however, a number of significant deficiencies in the implementation of these conventions have been revealed.<sup>125</sup> The concerns include the right to a fair trial, the right to freedom of expression and discrimination.<sup>126</sup> This may be a disadvantage to Vietnam’s extradition relations in general and to Vietnam’s requests for extradition of money launderers in particular.

### *Fiscal offences*

The fiscal offences exception is not stipulated in national law and in some of the older bilateral treaties of Vietnam. This suggests that, subject to article 33(1) of Law on MLA, these offences can be extraditable offences if they are punishable by at least one year of imprisonment under the criminal laws of both Vietnam and the requesting State. Following the international tendency, the recent extradition treaties of Vietnam have specified the relaxation of the exception. For example, article 2(4) of the extradition treaty with South Korea provides that “where extradition of a person is sought for an offence against a law relating to taxation, customs duties, foreign exchange control or other revenue matters, extradition may not be refused on the ground that the law of the Requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs, or exchange regulation of the same kind as the law of the Requesting Party”.<sup>127</sup> So, in general, Vietnam complies with the international standards on this exception.

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<sup>121</sup> Ibid, article 3(1)(a) and (e).

<sup>122</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987. Vietnam signed this convention in November 2013.

<sup>123</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, entry into force 23 March 1976. Vietnam ratified this convention in September 1982.

<sup>124</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195, entered into force January 1969. Vietnam ratified this convention in June 1982.

<sup>125</sup> See UN Human Right Council (2013), “*Universal Periodic Review of Vietnam*” at 1-13, available at: [http://www.fidh.org/IMG/pdf/joint\\_upr\\_submission\\_on\\_vietnam\\_final\\_version.pdf](http://www.fidh.org/IMG/pdf/joint_upr_submission_on_vietnam_final_version.pdf) (accessed 16 June 2014).

<sup>126</sup> Ibid.

<sup>127</sup> For example, article 2(4) of *South Korea-Vietnam Extradition Treaty*, above n21.

### *Death penalty exception*

Although the death penalty exception is not provided for in Vietnam's national law, it has been referred to as a mandatory basis for the refusal of extradition in a number of bilateral treaties, such as in article 51(6) of the Vietnam – Ukraine treaty on MLA and article 3(d) of the Vietnam – Australia extradition treaty. In Vietnam, the death penalty can be imposed on a range of crimes, including some transnational crimes, such as drug trafficking and corruption, but death is not imposed for money laundering crimes. This exception is obviously a barrier to extradition requested by Vietnam for some transnational crimes from certain States, for example, from Ukraine or Australia. It also prevents Vietnam from prosecuting a fugitive, who was extradited to Vietnam on a money laundering crime, for the predicate crime which carries the death penalty. In order to be successful in requesting extradition for money laundering, Vietnam needs to reassure States which have abolished the death penalty that Vietnam will apply the speciality rule rigidly and not prosecute someone who has been extradited for money laundering for a predicate offence that carries the death penalty.

### **8.4.4      *Evidence and Procedure***

In respect of the evidence standard for granting extradition, Vietnam does not apply the standard of a *prima facie* case. Vietnam appears to follow the civil law States' approach to evidentiary requirement. It requires the requesting State to provide the extradition file which consists of the written extradition request and the relevant documents. The relevant documents include, for example, the identity of the person sought, a summary of the criminal case in which the person sought was convicted, and the punishment for the crime of which the person sought was convicted.<sup>128</sup> The Ministry of Public Security (MPS) is in charge of receiving and examining the extradition file. If the documents of the extradition file are sufficient (the requesting State may be asked to provide additional information to satisfy the requirement of the MPS), the file will be sent to the court for an extradition hearing. The court will decide whether to grant extradition.<sup>129</sup> This procedure follows the traditional model. Apart from that, Vietnam has not implemented the simplification of extradition recommended by the FATF, such as allowing direct transmission of requests for provisional arrests between appropriate authorities or extraditing persons based only on warrants of arrests or judgments.

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<sup>128</sup> *Law on Mutual Legal Assistance*, above n111, article 37.

<sup>129</sup> *Ibid*, article 40.

It is worth mentioning that since the time when the Law on MLA came into force, there has been neither an outgoing nor incoming extradition request processed in accordance with the procedure prescribed in this law.<sup>130</sup> Prior to the adoption of this law, there were a few successful extradition cases processed formally in line with the domestic law and bilateral treaties.<sup>131</sup> It appears that the procedure is complicated and time-consuming, thus Vietnam's authorities (courts, procuracy and police) and their foreign counterparts do not want to proceed with extradition requests following such procedure. The delivery of a fugitive to or from foreign countries was mainly conducted through the use of "deportation" as a form of irregular rendition.<sup>132</sup> "Deportation", which was actually arranged by the Vietnamese police and the foreign authorities, resulted in the return of a person to a State for arrest and prosecution or serving a sentence.<sup>133</sup> Under article 17(3) of the Government Decree 21/2001/ND-CP,<sup>134</sup> a deportation order is issued by the minister of the MPS, usually based on the grounds that the deportation of the person is necessary to protect the State security and the social order. It is likely that Vietnam will also prefer to use "deportation" as a substitute for extraditing foreign money launderers out of Vietnam.

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<sup>130</sup> According to Ministry of Justice of Vietnam (2010), *"Report No. 230/BC-BCT on Mutual Legal Assistance in the Period of 01 July 2008 to 30 June 2010"* and the author's examination.

<sup>131</sup> In 2005, *Le Quoc Thuy*, who was alleged to have committed crimes of "abusing positions and/or powers to appropriate property" and "appropriating property through swindling" in Vietnam, was, through Interpol Vietnam, extradited successfully from Bulgaria to face prosecution in Vietnam. Before being extradited, *Le Quoc Thuy* had been arrested by the Bulgarian police under the "Red Notice" of INTERPOL. See VTV (2006) "Interpol Vietnam Dan Do Le Quoc Thuy Ve Nuoc [Interpol Vietnam Extradited *Le Quoc Thuy*]", *Thanh Nien*, 3 September 2006, available at: <http://www.thanhvien.com.vn/news/pages/200635/161107.aspx> (accessed 20 July 2013).

<sup>132</sup> In an interview with a Deputy Director of Interpol Vietnam in June 2013.

<sup>133</sup> For example, on 29 September 2010, Vietnamese police "deported" *Han Ki Bong* and *Cha Je Kiy*, two South Korean nationals accused of "illegally appropriating property" by South Korea, to South Korea for the prosecution. These persons fled to Vietnam after committing the crime, and then were wanted by the Korean police. The "wanted notice" was circulated to the Vietnamese police. After examining the information provided for by the Korean police about the fugitives and their crime, the double criminality condition was satisfied. Vietnamese police had traced and arrested them before arranging with the Korean police the "deportation". See Phong Anh ("Dan Do Hai Doi Tuong Pham Toi Nguoi Han Quoc ["Extradition" of two Korean Criminals]"), *Dat Viet*, 30 September 2010, available at: <http://www.baomoi.com/Dan-do-hai-toi-pham-nguoi-Han-Quoc/104/4939009.epi> (accessed 22 July 2013).

<sup>134</sup> Chinh Phu, "Nghị Định Quy Định Chi Tiết Thi Hành Pháp Lệnh Nhập Cảnh, Xuất Cảnh, Cư Trú Của Người Nước Ngoài Tại Việt Nam" [*Government, Decree on Guiding the Implementation of the Ordinance on Entry, Exit and Residence of Foreigners in Vietnam*] No. 21/2001/ND-CP (Vietnam), 28 May 2001 [*Government Decree 21/2001/ND-CP*].

#### 8.4.5 *Comments and Suggestions for Law Reform*

It can be seen that overall, although the domestic law on extradition of Vietnam is competent to deal with extradition requests, Vietnam has not implemented a number of international AMLSs on extradition, especially in regard to the specialty rule and the exceptions to extradition. Vietnam has only a few bilateral extradition treaties which cover comprehensively the extradition matters. Moreover, the practice, especially of extradition of transnational criminals, has been precluded by numerous factors. Most of the common obstacles to extradition apply equally to Vietnam. In addition, there are a number of key factors which are of particular relevance to the laws and the practice of extradition of Vietnam with regard to transnational money launderers. This thesis identifies these factors and makes suggestions as follows:

i) Extradition for money laundering crimes is a novel legal process for Vietnam. Money laundering is a new crime provided for in the Penal Code of Vietnam. As noted in chapter 3, Vietnamese authorities, including investigators, prosecutors and judges, have not been familiar with the investigation, prosecution, trial and, of course, with extradition for such crimes. These authorities need to be trained especially in how to apply the extradition procedure provided for by the Law on MLA. Furthermore, in certain circumstances, the procedure could be simplified as recommended by the FATF.

ii) Vietnam makes a reservation to article 6 (about extradition) of the 1988 Vienna Convention. As a result, the crimes criminalized in the convention may be not included as extraditable crimes in some bilateral extradition treaties of Vietnam. This reservation may preclude Vietnam from extraditing many fugitives who have committed drug trafficking or laundering the proceeds of drug trafficking in Vietnam. Hence, Vietnam should consider the withdrawal of the reservations to article 6 of the Vienna Convention.

iii) The concept of evidence in criminal proceedings is unique and different from that of many countries.<sup>135</sup> This difference is one of the primary challenges to an extradition process subject to the Law on MLA. For example, digital evidence, which may be used in cyber-money laundering cases, is not “material evidence” under Vietnamese criminal law, thus has not been recognized by Vietnamese authorities. This implies that Vietnam should reform its law on evidence.

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<sup>135</sup> The concept of evidence was illustrated in chapter 6.

iv) The application of the death penalty and the certain deficiencies in basic human rights in Vietnam can be barriers to its extradition practices. The death penalty will be a bar to extradition of certain predicate crimes to money laundering from those States that have abolished capital punishment. Foreign States may also abuse the human rights exception to refuse extradition requests from Vietnam. So, Vietnam should ensure that the human rights of all matters subject to extradition will be respected.

And v) Vietnam refuses to extradite its nationals, but the national law is silent on the alternatives. Vietnam should provide clearly the *aut dedere aut judicare* principle and the procedure for prosecution when refusing extradition in the Law on MLA. Alternatively it could consider extraditing its nationals on condition of return for sentence. If extradition for purposes of enforcing sentence is rejected upon the nationality ground, Vietnam should consider the enforcement of that punishment itself.

## 8.5 Conclusion

In a nutshell, extradition of transnational criminals is a crucial component of the international regime against transnational crime. Extradition is normally only obligatory if required by bilateral treaty. Nonetheless, even given the existence of a bilateral treaty, the States are still not willing to grant extradition because of the various barriers, for example, obstacles generated from the conditions, principles and standard of evidence in extradition. These legal obstacles may be exacerbated in case of extradition for transnational money laundering offences which are associated with predicate offences that have occurred abroad. Difference in categories of the predicate offence between States often leads to controversies when the double criminality condition and the specialty rule with regard to the predicate offence are required.

The international AML legal instruments call for States to recognize money laundering offences as extraditable offences, and apply the international standards regarding conditions/principles and procedure for the extradition of money laundering offenders. Common standards of extradition would eliminate the obstacles. It appears that State Parties to the suppression conventions and member countries of the FATF are striving for a greater harmonization of national laws on extradition. The application of the double criminality condition, specialty rule and sufficiency of evidence approach to extradition for transnational money laundering offences is now more elastic in many countries. The procedure for extradition can be simplified in certain circumstances.

In the context of Vietnam, the implementation of international standards on extradition in general and for money laundering in particular remains inadequate. The practice of extradition is very limited. This thesis has identified the main reasons and has suggested certain legal changes. These changes can be made, at least on paper, without much consideration. Then Vietnam can satisfy a paper-based assessment conducted by the FATF. Nevertheless, Vietnam needs much more time and resources to implement the new laws in practice, especially to fund and train its authorities in investigating, prosecuting, trying and extraditing for money laundering crimes. Therefore, in the near future, the law reforms seem unlikely to result in a significance deterrent to transnational money laundering operating in Vietnam.



**Chapter 9**  
**PREVENTION OF THE CRIMINAL USE OF**  
**FINANCIAL INSTITUTIONS, DESIGNATED NON-FINANCIAL BUSINESSES**  
**AND PROFESSIONS FOR THE PURPOSE OF MONEY LAUNDERING**

- 9.1 Introduction**
- 9.2 Concepts of Customer Due Diligence and Know Your Customer**
- 9.3 International Standards of CDD and Record Keeping**
  - 9.3.1 The FATF Recommendations*
  - 9.3.2 The Basel Committee on Banking Supervision*
- 9.4 Reporting Obligation**
- 9.5 The Interaction between Preventive Measures and Financial Privacy and the Right to Professional Secrecy**
  - 9.5.1 Preventive Measures and Banking Secrecy*
  - 9.5.2 Preventive Measures and Professional Secrecy*
- 9.6 Risk-based Approach, Financial Inclusion and Preventive Measures**
  - 9.6.1 Risk-based Approach*
  - 9.6.2 Financial Inclusion*
- 9.7 Interim Conclusion**
- 9.8 Overview of Vietnamese Financial Institutions, Designated Non-Financial Businesses and Professions**
  - 9.8.1 Financial Institutions*
  - 9.8.2 Non-Financial Businesses and Professions*
- 9.9 The Application of Preventive Measures on Vietnamese Financial Institutions, Designated Non-Financial Businesses and Professions**
  - 9.9.1 Customer Due Diligence and Record Keeping*
  - 9.9.2 Reporting Obligation*
  - 9.9.3 Financial Institution Privacy and Confidentiality*
  - 9.9.4 Risk-based Approach and Financial Inclusion*
  - 9.9.5 Comments and Suggestions*
- 9.10 Conclusion**

## 9.1 Introduction

A set of preventive measures, which mainly aims at uncovering opportunities offered by the legitimate environment to facilitate money laundering, is an important and indispensable part of the international AMLs. A wide range of money laundering preventive measures have been imposed mainly on the financial institutions, and on designated non-financial businesses and professions (DNFBPs)<sup>1</sup> which are the most vulnerable to money laundering operations. The key measures include Customer Due Diligence (CDD), record keeping, and reporting of suspicious transactions. These measures have the aims of deterring and detecting criminals from using the financial institutions and DNFBPs for laundering the proceeds of crime. These entities are obliged to launch these measures because: i) criminals often make use of them as the main intermediaries for money laundering operations (the mechanism and typologies of money laundering which were set out in chapter 2 indicate this); ii) the interaction with the legitimate environment is seen as a “weak point” in the stages of money laundering, at which law enforcement agencies can intervene for deterring and detecting money launderers; iii) the integrity of financial service providers and professions, which contributes significantly to public confidence, must be protected from money laundering involvement; and iv) nobody in the legitimate environment should profit from criminals.

The key preventive measures, namely CDD, record keeping and the reporting of suspicious transactions are provided for in both “hard law” (article 7 of the United Nations Convention against Transnational Organised Crime (the Palermo Convention)<sup>2</sup> and article 14 of the United Convention against Corruption (the UNCAC)<sup>3</sup>) and “soft law” (the FATF Recommendations and initiatives of other international organizations). It should be noted that the provisions of the “hard law” are drafted in a general manner since they build on ongoing international initiatives to combating money laundering,<sup>4</sup> and “States Parties are called upon

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<sup>1</sup> FATF, “*The FATF Recommendations - Glossary*” at 113, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 21 July 2013).

<sup>2</sup> *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003, article 12.

<sup>3</sup> *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005, article 31.

<sup>4</sup> See UNODC, “*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*” (2004) at 50, available at: [http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf) (accessed 21 April 2013).

to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering”.<sup>5</sup> According to the interpretative notes of the negotiation of Palermo Convention, the relevant initiatives of regional, interregional and multilateral organizations refer in particular to the FATF Recommendations and initiatives of other international organizations.<sup>6</sup> In fact, the FATF, in its Recommendations and their revisions, has detailed and developed extensively the preventive measures. Because of that, this chapter focuses on examining the preventive measures provided for in the FATF Recommendation.

This chapter begins by setting out the principal preventive measures imposed on financial service providers and professions. The interaction between the preventive measures and the right to privacy, which is one of the most contentious issues arising from the implementation of preventive measures, is then discussed. Finally, the implementation of preventive measures in Vietnam is examined and suggestions are made for reform.

## **9.2 Concepts of Customer Due Diligence and Know Your Customer**

It appears that the use of terms “Customer Due Diligence” and “Know Your Customer” (KYC) is sometimes confusing. It is necessary to clarify the meaning of these terms through examining the history and the development of these concepts.

The term “due diligence” has its origins in Anglo-American law, particularly in the statutory regulations controlling the capital market in the US.<sup>7</sup> Originally the due diligence concept appeared in security laws designed to protect investors; it has evolved into the systematic and professional investigation of business opportunities and risks during on-going sale negotiations.<sup>8</sup> It may entail financial, marketing, human resources, legal and tax, environmental and organizational/IT due diligence.<sup>9</sup> In other words, the object of the due diligence process is to obtain information on and engage in evaluation of the background of a target company including its structure, the capabilities of its employees, its market

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<sup>5</sup> See the Palermo Convention, article 7, para. 3; and the UNCAC, article 14, para. 4.

<sup>6</sup> See *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 3 November 2000, A/55/383/Add.1.

<sup>7</sup> Gernard Picot, *Handbook of International Mergers and Acquisitions: Preparation, Implementation, and Integration* (Palgrave Macmillan, 2002) at 154.

<sup>8</sup> Ibid, at 154-155.

<sup>9</sup> Ibid, at 155-178.

opportunities and risks.<sup>10</sup> With regard to CDD, it normally refers to the investigation procedure of a new customer's background conducted by the financial institutions prior to doing business with the new customer.

The term "Know Your Customer" and the "KYC guidelines" originated in a legislative report on the US Bank Secrecy Act, but they were not defined in that report and no examples were given to illustrate what KYC means.<sup>11</sup> Since 1970, the US government has deployed US banks as the principal agencies to track down the proceeds of crime by imposing an obligation to know their customers and to report suspicious transactions.<sup>12</sup> As a result of this, KYC principles and KYC guidelines have evolved and become ingrained in the US AML regime as tools for banks to: i) prevent criminals from presenting as their legitimate customers; and ii) reveal the illicit nature of a customer's business.<sup>13</sup>

The FATF and other international institutions (e.g., the Basel Committee on Banking Supervision) have worked intensively on the KYC issue which "is most closely associated with the fight against money laundering".<sup>14</sup> In 1988, the Basel Committee on Banking Supervision issued the Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering including the principle of "Customer Identification". It called for reasonable effort by the international banking community to determine the true identity of all customers requesting their services.<sup>15</sup> In 1990, the first version of the 40 FATF Recommendations provided an initiative to combat the misuse of the financial system for laundering the proceeds of drug-related crimes.<sup>16</sup> This version and the later revised ones (in 1996, 2003 and 2012) recommend various measures to prevent financial institutions and certain other businesses and professions from involving money laundering. The FATF uses the term "Customer Due Diligence" or "Identification of Customer" instead of "Know Your Customer" to refer to the preventive measures. In 2001, after identifying the deficiencies in a

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<sup>10</sup> Ibid, at 178.

<sup>11</sup> Daniel Mulligan, "Know Your Customer Regulations and the International Banking System: Towards a General Self-Regulatory Regime" (1998) 22 Fordham International Law Journal 2324 at 2358.

<sup>12</sup> Thomas D. Grant, "Toward a Swiss Solution for an American Problem: An Alternative Approach for Banks in the War on Drugs" (1995) 14 Annual Review of Banking Law 225 at 227.

<sup>13</sup> Mulligan, above n11.

<sup>14</sup> Basel Committee on Banking Supervision (2001), "*Customer Due Diligence for Banks*" at 2, available at: <http://www.bis.org/publ/bcbs85.pdf> (accessed 22 May 2014).

<sup>15</sup> Basel Committee on Banking Supervision, "*Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering*" at 3, available at: <http://www.bis.org/publ/bcbsc137.pdf> (accessed 22 July 2013).

<sup>16</sup> FATF (1990), "The Forty Recommendations of the FATF", available at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf> (accessed 24 May 2013).

large number of countries' KYC principles for banks,<sup>17</sup> the Basel Committee on Banking Supervision revised the KYC principles to make them more applicable to all countries. In the CDD for Banks, the scope of the Basel Committee's approach to KYC has been expanded with a view to serving not only AML but also the effective management of banking risks. KYC involves more extensive due diligence for higher risk accounts, and includes proactive account monitoring for suspicious activities.<sup>18</sup> In short, KYC and CDD have been introduced as evolving concepts designed to be adaptable and effective for use in both banks and other financial institutions. These terms do not have a fixed content, and they frequently appear to be used interchangeably. However, CDD is often used to refer to a standard that is broader than KYC.<sup>19</sup> KYC could be conceived of as the specific CDD standard that imposes on banks and other financial institutions the duty to identify their customers.

### **9.3 International Standards of CDD and Record Keeping**

#### **9.3.1 *The FATF Recommendations***

The leading standards of CDD for the purposes of fighting money laundering and terrorist financing have been set out by the FATF. The FATF has amended its recommendations together with a glossary and interpretative notes that define and clarify comprehensively the CDD standards applied to financial institutions and DNFBPs.

According to the FATF Recommendations, a financial institution should be required to undertake CDD measures when:<sup>20</sup>

- 1) Establishing business relations;
- 2) Carrying out occasional transactions: (i) above the applicable designated threshold (US\$/EUR 15,000); or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Recommendation 16;
- 3) There is a suspicion of money laundering or terrorist financing; or

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<sup>17</sup> Basel Committee on Banking Supervision, above n14, at 1.

<sup>18</sup> Ibid.

<sup>19</sup> See more in Louis de Koker, "Money Laundering Control and Suppression of Financing of Terrorism: Some Thoughts on the Impact of Customer Due Diligence Measures on Financial Exclusion" (2006) 13(1) Journal of Financial Crime 26 at 28-29.

<sup>20</sup> FATF (2012), "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - the FATF Recommendations", available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 22 May 2014), Recommendation (R)10(i), (ii), (iii), and (iv).

- 4) The financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The CDD measures to be taken are as follows:<sup>21</sup>

- a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.
- b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.
- c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
- d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

The 2012 FATF 40 Recommendations and their interpretative notes especially emphasize the use of CDD in regard to legal persons and arrangements. They recommend that financial institutions should verify and identify any person purporting to act on behalf of the customer, the beneficial owners and the trustee.<sup>22</sup> Further, financial institutions should perform enhanced due diligence on higher risk categories of customers, such as Politically Exposed Persons (PEPs). But they also provide that simplified or reduced CDD measures may be applied to lower risk customers, such as financial institutions or public companies under rigorous regulation, government administration or enterprises.<sup>23</sup>

The obligation of record keeping requires that financial institutions keep customer identification and records of financial transactions. The database of this information which can be accessible by law enforcement authorities when required is extremely helpful for the investigation and prosecution of money laundering offences. In their investigations, law enforcement bodies normally need to follow the trails of the movement of criminal proceeds, which can be revealed through the records kept by the financial service providers or professionals involved. Thus, record keeping can serve a repressive approach effectively.

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<sup>21</sup> Ibid, R10(a), (b), (c), and (d).

<sup>22</sup> Ibid, Interpretive Note to Recommendation (INR) 10, part (B), (C), and (D).

<sup>23</sup> Ibid, INR 10, pars. 16-18.

R11 of the 2012 FATF Recommendations states that:

Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal activity.

Financial institutions should keep records on the identification data obtained through the customer due diligence process (e.g., copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence, including the results of any analysis undertaken (e.g., inquiries to establish the background and purpose of complex, unusual large transactions), for at least five years after the business relationship is ended, or after the date of the occasional transaction.

Financial institutions should be required by law to maintain records on transactions and information obtained through the CDD measures.

The CDD information and the transaction records should be available to domestic competent authorities upon appropriate authority.

R22 of the 2012 FATF Recommendations has extended the CDD and record keeping requirement to the non-financial businesses and professions which engage in the financial activities of their clients in certain situations.<sup>24</sup>

### **9.3.2      *The Basel Committee on Banking Supervision***

As one of the primary requirements in bank supervision, a comprehensive set of standards of CDD for banks has been developed by the Basel Committee on Banking Supervision that contains four basic elements:<sup>25</sup>

(1) Customer acceptance policy: This requires banks to develop clear customer acceptance policies and procedures, including a description of the types of customers that are likely to pose a higher than average risk to a bank. Factors, such as customers' background, country of origin, public or high profile position, linked accounts, business activities or other risk indicators should be considered in preparing this policy. More extensive CDD should be required for higher risk customers.

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<sup>24</sup> Ibid, R22.

<sup>25</sup> Basel Committee on Banking Supervision, above n14, at 6-14.

(2) Customer identification: Banks should obtain satisfactory information about the identity of a new customer and the purpose of the business relationship. The adequacy of information depends on the type of applicant and anticipated size of accounts. Special requirements of information are required when implementing CDD measures on PEPs and non-face-to-face customers.

(3) On-going monitoring of high-risk accounts: Banks should have an understanding of normal and reasonable account activity of their customers so that they can recognize and report suspicious transactions to the competent authorities. This on-going monitoring mainly aims at higher risk accounts.

(4) Risk management: The channels for reporting suspicious transactions should be clearly specified for effective communication. The roles of internal audit and employee-training programmes should be emphasized for insuring effective risk management. Bank staff should have an adequate on-going training about CDD procedures. Audit functions should be staffed adequately because internal audit plays an important role in evaluating risk management.

It is noticeable that the very broad definition of “customer” in “Customer Due Diligence for Banks” issued by the Basel Committee in 2001 includes: i) the person or entity that maintains an account with the bank or those on whose behalf an account is maintained (i.e. beneficial owners); ii) the beneficiaries of transactions conducted by professional intermediaries; and iii) any person or entity connected with a financial transaction who can pose a significant reputational risk or other risks (operational, legal and concentration risk) to the bank.<sup>26</sup>

Beside the Basel Committee which has focused on CDD standards for the banking system, other international associations of financial regulators have also specifically defined the CDD standards or the CDD process for banks and other kinds of financial institutions consistent with the FATF Recommendations.

In 2000, the Wolfsberg Group published the Wolfsberg Anti-Money Laundering Principles for Private Banking (revised in 2002 and 2012) which contains the essential global AML guidelines for private banking.<sup>27</sup> It sets out the core guidelines in terms of CDD

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<sup>26</sup> Ibid, at 6.

<sup>27</sup> The Wolfsberg Group, “Wolfsberg Anti-Money Laundering Principles for Private Banking (2012)”, available at: <http://www.wolfsberg-principles.com/pdf/Wolfsberg-Private-Banking-Principles-May-2012.pdf> (accessed 22 July 2013).



requirements for the client and the beneficial owner.<sup>28</sup> Additional due diligence is required in some situations, such as business in relation to clients from high-risk countries (which have inadequate AML standards or where there is a high risk of crime and corruption) or business involving public officials.

In 2004, the International Organization of Securities Commission (IOSCO) introduced its Principles on Client Identification and Beneficial Ownership for the Securities Industry, which states that “the CDD process is a key component of securities regulatory requirements intended to achieve the principal objectives of securities regulation, the protection of investors; ensuring that markets are fair, efficient and transparent; and the prevention of the illegal use of the securities industry”.<sup>29</sup> The CDD process should be applied by the authorized securities service providers (ASSPs) to: identify their clients and beneficial owners; obtain adequate information about their clients’ circumstances and investment objectives; and keep records of this information.<sup>30</sup> Although the main objectives of this process are to prevent securities fraud and market abuse, the application of the CDD process in the securities industry also contributes to the prevention of the illegal use of the securities industry for the purposes of money laundering and the financing of terrorism.<sup>31</sup>

The International Association of Insurance Supervisors (IAIS), in 2003, revised the Insurance Core Principles and Methodology by adding new principles addressing supervisory standards related to Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT).<sup>32</sup> In 2004, the IAIS issued the Guidance Paper on AML/CFT which contains a specific description of the CDD process as core measures against money laundering and financing terrorism.<sup>33</sup>

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<sup>28</sup> Ibid, at 2-3.

<sup>29</sup> IOSCO (2004), “*Principles on Client Identification and Beneficial Ownership for the Securities Industry*” at 2, available at: [http://www.cnmv.es/publicaciones/IOSCO\\_seguridad.pdf](http://www.cnmv.es/publicaciones/IOSCO_seguridad.pdf) (accessed 22 July 2013).

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> IAIS (2003), “Insurance Core Principle and Methodology”, ICP 28, available at: [http://www.iaisweb.org/\\_\\_temp/Insurance\\_core\\_principles\\_and\\_methodology.pdf](http://www.iaisweb.org/__temp/Insurance_core_principles_and_methodology.pdf) (accessed 22 July 2013). This provision was then updated in IAIS (2012), “Insurance Core Principles, Standards, Guidance and Assessment Methodology (as amended 12 October 2012)”, ICP 22, available at: <http://www.iaisweb.org/Insurance-Core-Principles-material-adopted-in-2011-795> (accessed 22 July 2013).

<sup>33</sup> IAIS (2004), “*Guidance Paper on Anti-Money Laundering and Combating the Financing of Terrorism*” at 6-15, available at: [http://www.iaisweb.org/\\_\\_temp/Guidance\\_paper\\_on\\_anti\\_money\\_laundering\\_and\\_combating\\_the\\_financing\\_of\\_terrorism.pdf](http://www.iaisweb.org/__temp/Guidance_paper_on_anti_money_laundering_and_combating_the_financing_of_terrorism.pdf) (accessed 22 July 2013).

## 9.4 Reporting Obligations

The effectiveness of a national AML system is essentially dependent on whether the relevant competent authorities have adequate information on the funds and financial transactions in regard to which suspicions of money laundering arise. This information comes from three main sources:<sup>34</sup> i) mandatory reports provided by persons and institutions covered by law; ii) databases available for access (computer databases for the most part); and iii) information exchanged with other AML authorities. Among these sources, mandatory reporting is a crucial prerequisite for an effective AML strategy for a range of reasons. First, money laundering itself is a crime without direct victims. The information provided by institutions and professions, who are commonly vulnerable to money laundering, is extremely critical to the prevention and investigation of money laundering. Second, money laundering is normally accompanied by the carrying out of financial transactions through financial institutions which maintain certain privacy standards. As a result, law enforcement authorities find it difficult to get information about these transactions. Thus, financial institutions and DNFBPs should be subject to the mandatory obligation of reporting suspicious funds or transactions.

Under the reporting obligation, reporting entities are required to analyse the funds and financial transactions involved, then assess whether the funds or transactions raise suspicions. These funds or transactions deemed suspicious must then be reported to the competent authorities. R20 of the 2012 FATF Recommendations reads that “if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit (FIU)”.

R23 of the 2012 FATF Recommendations provides that:

a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph d) of Recommendation 22. Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.

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<sup>34</sup> J. F. Thony, “Processing Financial Information in Money Laundering Matters: The Financial Intelligence Units” (1996) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 257 at 258.

- b) Dealers in precious metals and dealers in precious stones should be required to report suspicious transactions when they engage in any cash transaction with a customer equal to or above the applicable designated threshold.
- c) Trust and company service providers should be required to report suspicious transactions for a client when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to Recommendation 22.

The Wolfsberg Group, in their Wolfsberg AML Principles on Private Banking, refers to “unusual or suspicious transactions” undertaken in the banking system that may include:<sup>35</sup>

- 1) Account transactions or other activities which are not consistent with the due diligence file;
- 2) Cash transactions over a certain amount; and
- 3) Pass-through/in-and-out-transactions.

It should be stressed that there is no international consensus on the criteria for identifying suspicious transactions. The international instruments leave room for States to set out their own criteria for identifying suspicious transactions.

The onerous burden has been imposed on financial institutions or DNFBPs of judging whether the nature of transaction raises suspicions. However, there is a risk of missing certain suspicious money laundering transactions because financial institutions or DNFBPs may lack the capacity or expertise to analyse the suspicious funds or transactions.

In fact, the determination of suspicious transactions can be based upon the customer profile obtained through the CDD process. It means the obligation of reporting suspicious transactions can be a part of the extended requirement of CDD in some situations.<sup>36</sup> The obligation of applying an enhanced CDD process in certain circumstances takes precedence over the obligation of reporting suspicious transactions.

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<sup>35</sup> Wolfsberg Group, “*Wolfsberg Anti-Money Laundering Principles for Private Banking (2012)*” at 6, available at: <http://www.wolfsberg-principles.com/pdf/Wolfsberg-Private-Banking-Principles-May-2012.pdf> (accessed 22 May 2014).

<sup>36</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) at 162.

## **9.5 The Impact of Preventive Measures on Financial Privacy and The Right to Professional Secrecy**

The implementation of preventive measures on financial service providers and professions has raised controversial arguments about the risk of interference with financial privacy and the infringement on the fundamental right to professional secrecy recognized by most States under their constitutional law.<sup>37</sup> The obligation of record keeping requires that the identification data and transaction records should be available to domestic competent authorities upon appropriate authority.<sup>38</sup> The reporting obligation may also conflict with the desire for financial privacy and the right to professional secrecy, such as confidential communication between lawyers, notaries or accountants with their clients. The interactions between the obligations to take preventive measures and bank secrecy (a notable form of financial privacy), and between those obligations and professional secrecy will be addressed in detail below.

### **9.5.1 Preventive Measures and Banking Secrecy**

#### *Concept and justifications for banking secrecy*

Although banking secrecy appears to have a long historical development closely associated with the history of banking, modern banking secrecy actually evolved after World War I.<sup>39</sup> It was not legally recognized in the form of banking secrecy law until the 1930s. The first banking secrecy law was enacted in Switzerland in 1934, but since then it has flourished in many other States around the world.<sup>40</sup> Whilst the meaning of banking secrecy has been widely understood as the principle of confidentiality in financial transactions, there is no comprehensive concept or description of the term “banking secrecy” at the international level.<sup>41</sup> In general, banking secrecy law protects a range of aspects of banker - customer relationships that are expressed in two main rules:<sup>42</sup> i) the banker shall not disclose the

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<sup>37</sup> Article 12 of the United Nations (1948), *"The Universal Declaration of Human Rights"* stipulates that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”.

<sup>38</sup> FATF, above n20, R11.

<sup>39</sup> Edouard Chambost, *Bank Accounts: A World Guide to Confidentiality* (John Wiley & Sons, 1983) at 3-8.

<sup>40</sup> Ibid, at 5-6; and see Richard Gagnon, “International Banking Secrecy: Developments in Europe Prompt New Approaches” (1990) 23 *Vanderbilt Journal of Transnational Law* 653 at 659-660.

<sup>41</sup> He Ping, “Banking Secrecy and Money Laundering” (2004) 7(4) *Journal of Money Laundering Control* 376 at 376.

<sup>42</sup> Ibid.

customer's financial information to interested parties, leaving aside a number of exceptions; and ii) the customer's financial information shall be protected legally from the intrusion of other parties.

Most States recognize and adopt some forms of banking secrecy based on a number of justifications.<sup>43</sup> The justifications vary from State to State, and thus, have resulted in a variety of legal bases for protecting banking secrecy at different levels of stringency.<sup>44</sup> The justifications for banking secrecy derive from both the interest of the bank and its customers.<sup>45</sup> It should be recognized that although in certain States, banking secrecy is reinforced by statute and even protected by criminal sanction, it is not a part of universally accepted civil liberties or human rights.<sup>46</sup> According to English law, the banker-customer relationship is a contractual obligation, not an inalienable right.<sup>47</sup> Similarly, under German banking law, the foundation of the banker-customer relationship is dependent on a "general banking contract".<sup>48</sup>

Most individuals want to prevent their financial information from being accessible by other interested parties. The demand for financial secrecy arises from the personal, business, political, fiscal or criminal motivations.<sup>49</sup> In a cashless society, where most financial transactions are conducted through banking services, banking records can directly reflect many aspects of a customer's affairs that he/she wants to keep secret. For instance, the financial records of a person can reflect his lifestyle, financial situation, or even every physical movement. Thus, organized criminals or political tyrants consider banking secrecy as a shield to hide and secure their assets. Money launderers rely on banking secrecy as a crucial tool facilitating their criminal activities. In addition, people possessing substantial wealth are often targets for criminals. Hence, these people often seek the skilled banking systems that provide strict banking secrecy. In response to the customer's demand for financial secrecy, divergent national and international bankers have offered banking secrecy

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<sup>43</sup> See different national banking laws and their rationales in Chambost, above n39, at 91-259.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid, at 9-26.

<sup>46</sup> See George J. Moscarino, "Beating the Shell Game: Bank Secrecy Laws and Their Impact on Civil Recovery in International Fraud Actions" (1997) 18(6) *Company Lawyer* 177 at 183, and See Peter Maynard, "Bahamas: Civil Liberties and Privacy - The Question of Balance" (1997) 1(2) *Journal of Money Laundering Control* 177 at 177.

<sup>47</sup> E.P. Ellinger, Eva Lomnicka and Richard Hooley, *Ellinger's Modern banking law* (4th ed, Oxford University Press, 2006) at 117-121.

<sup>48</sup> Valsamis Mitsilegas, *Money Laundering Counter-Measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles* (Kluwer Law International, 2003) at 127.

<sup>49</sup> Ingo Walter, *The Secret Money Market : Inside the Dark World of Tax Evasion, Financial Fraud, Insider Trading, Money Laundering, and Capital Flight* (Harper & Row Ballinger Division, 1990) at 1-4.

as a kind of product. They compete with one another in terms of quality or cost of this type of product. Further, desirable banking systems are usually located in countries renowned for their political, social, economic and monetary stability. This explains why some countries (e.g., Switzerland, Luxembourg or Hong Kong) are known as “banking secrecy havens”.<sup>50</sup>

A number of countries have enacted strict banking secrecy laws with the aim of supporting their banking industries as well as their economies. Stringent banking secrecy has been used to attract foreign funds and to profit from the management of these funds.<sup>51</sup> Some of these countries are located in the Caribbean and South Atlantic close to unstable Latin American governments and drug producing countries. They include Antigua, the Bahamas, Bermuda, the Cayman Islands, Montserrat, the Netherlands Antilles, and Panama. Their geographical proximity and their stringent banking secrecy make them desirable destinations for capital flight and the proceeds of crime.<sup>52</sup> In these countries, the banking secrecy law is an essential legal instrument of the banking industry which is a major contributor to their economies. However, these “banking secrecy havens” appear to make transnational money laundering more rampant and serious.<sup>53</sup>

#### *The instruments of banking secrecy*

States choose different instruments to enforce banking secrecy. The most basic level of banking secrecy is achieved through a direct instrument, such as some type of deposit account: a “classic named account”, “numbered account” or account under a false name.<sup>54</sup>

A “classic named account” allows withdrawal over the counter. A customer who wants to open this type of account normally has to provide his/her personal details, such as name, address, and a sample signature for the bank. The sample signature allows the cashier to recognize the customer when withdrawing cash over the counter.

A “numbered account” or account held under a false name is an account where the holder is denoted for general purposes by a number or code, or sometimes a pseudonym. The identity and other personal details of the customer are known only to a limited number of bank staff members who are responsible for the relationship with the customer, normally the

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<sup>50</sup> Chambost, above n39, at 145-250.

<sup>51</sup> Moscarino, above n46, at 184.

<sup>52</sup> Walter, above n49, at 210-221.

<sup>53</sup> In Mary Alice Young, *Banking Secrecy and Offshore Financial Centers: Money Laundering and Offshore Banking* (Routledge, 2013) at 161, the author has pointed out that “banking secrecy havens” undermine the effectiveness of confiscation of the proceeds of crime on a global level.

<sup>54</sup> Chambost, above n39, at 39-67.

bank director and the account manager. Others, who process the transactions for the bank account, only know the number, code or pseudonym. A “numbered account” is a well-known direct instrument of banking secrecy protecting the customers from unauthorised disclosure. It was an essential banking secrecy instrument in the Swiss banking system from the 1950s.<sup>55</sup> Nonetheless, under pressure from the international community, in 2003 Switzerland introduced its new Money Laundering Law which forces Swiss banks to reveal the name of customers when transferring money abroad.<sup>56</sup> Though the numbered account has not disappeared entirely, customers are no longer able to hide their identity when making transactions abroad.

The indirect instruments of banking secrecy include “shell companies” or “offshore captive banks”.<sup>57</sup> “Shell companies” or anonymous corporations are non-publicly traded corporations, limited liability companies and other business entities (e.g., trusts) that have no physical presence other than a mailing address and generate little or no independent economic value.<sup>58</sup> A financial institution may provide financial services for these entities, such as internet banking or currency exchange.<sup>59</sup> “Shell companies” may serve legitimate commercial purposes, such as: holding stock or intangible business assets, facilitating domestic and cross-border currency and asset transfers, and facilitating corporate mergers.<sup>60</sup> These companies are easy and inexpensive to set up and operate; beneficial ownership is securely anonymous, and transaction details can be concealed from regulatory and law enforcement agencies.<sup>61</sup> Thus, this kind of company has been seen as a big business, and States compete at offering more secure anonymity along with other benefits in incorporation services. In the US, the UK and other States with lax incorporation requirements, “shell companies” are freely available to anyone with an internet connection and some money.<sup>62</sup> However, “shell companies” can aid criminals by providing the appearance of legitimacy and

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<sup>55</sup> David Chaikin, “Policy and Fiscal Effect of Swiss Bank Secrecy” (2005) 15(1) *Revenue Law Journal* 90 at 101-102

<sup>56</sup> *Ibid.*

<sup>57</sup> Walter, above n49, at 41-44; and Chambost, above n39, at 58-75.

<sup>58</sup> “Money Laundering Through Shell Companies, LLCs, and Trusts”, (2006)(493) *ABA Trust Letter* at 6.

<sup>59</sup> See *ibid.*; and J. C. Sharman, “Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System” (2010) 24(4) *Journal of Economic Perspectives* 127 at 130-132.

<sup>60</sup> See *Money Laundering Through Shell Companies, LLCs, and Trusts*, above n58; and Ioannis V. Floros and Travis R.A. Sapp, “Shell games: On the value of shell companies” (2011) 17(4) *Journal of Corporate Finance* 850 at 851-852.

<sup>61</sup> *Money Laundering Through Shell Companies, LLCs, and Trusts*, above n58.

<sup>62</sup> Sharman, above n59.

access to the national and international financial system through their bank accounts.<sup>63</sup> “Shell companies” may be formed and then open corporate bank accounts for illegal purposes. The transactions processed through the corporate accounts of such a “shell company” are effectively untraceable and are thus very useful for the purpose of concealing criminal proceeds.<sup>64</sup> There are numerous cases of abuse of shell corporations for transnational financial crimes.<sup>65</sup> In 2000, almost all large-scale money laundering operations in Britain involved “shell companies”.<sup>66</sup> The US has recently paid more attention to the problems of “shell companies” as part of their ongoing AML and combating terrorist financing initiatives. In 2006, FinCEN (Financial Crimes Enforcement Network), which is the Financial Intelligence Unit (FIU) of the US, stated that “lack of transparency in the formation and operation of shell companies may be a desired characteristic for certain legitimate business activity, but it is also a vulnerability that allows these companies to disguise their ownership and purpose”.<sup>67</sup> Furthermore, the problems of “shell companies” have been widely identified in various reports and research projects on combating some transnational crimes, such as: drug trafficking-related crimes, terrorism, money laundering, corruption, or tax evasion.<sup>68</sup> As a result, a number of international legal instruments have obliged financial institutions that the beneficial ownership of legal persons and legal arrangement must be ascertained.<sup>69</sup>

Another indirect instrument of banking secrecy is “captive bank”, which is a bank that exists purely for the benefit of one natural or legal person or a group of people.<sup>70</sup> Traditionally, it is the wholly or partially owned subsidiary of a company. For example, A, B and C are companies that belong to Mr X who also controls captive bank D. Bank D is established primarily to fulfil the financial requirements of Mr X’s companies. It generally offers all basic banking services (e.g., safe-keeping of deposits). In some cases, it may provide additional services, for example merchant banking. To maximize profits, captive banks are usually offshore banks located in “tax havens”. An offshore “captive bank”, which

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<sup>63</sup> Money Laundering Through Shell Companies, LLCs, and Trusts, above n58.

<sup>64</sup> Sharman, above n59, at 127-130.

<sup>65</sup> Ibid, at 127-130.

<sup>66</sup> "Shell Games: The Financial Action Task Force Tries to Crackdown on Abuse of Corporate Vehicles", *The Economist*, 24 October 2002, available at: <http://www.economist.com/node/1408104> (accessed 8 January 2013).

<sup>67</sup> FinCEN (2006), *Potential Money Laundering Risks Related to Shell Companies* at 1, available at: [http://www.fincen.gov/statutes\\_regs/guidance/pdf/AdvisoryOnShells\\_FINAL.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/AdvisoryOnShells_FINAL.pdf) (accessed 23 July 2013).

<sup>68</sup> Sharman, above n62, at 129.

<sup>69</sup> *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41, entered into force 14 December 2005, article 52; and FATF, above n20, R10, 22, 24 and 25.

<sup>70</sup> Walter, above n49, at 43-44.



is resident in a “tax haven”, may enjoy various benefits,<sup>71</sup> such as lax tax liability and greater privacy resulting from the stringent banking secrecy laws in the country of location. This kind of bank obviously provides a useful tool for money launderers.

### *Preventive measures challenging banking secrecy*

Because banking secrecy has been exploited as an effective tool to secure the proceeds of crime, in most jurisdictions there are certain compulsory circumstances in which banking secrecy is lifted or relaxed to serve the fight against crime. The information disclosed by the banks and used by competent authorities is very important in protecting the bankers as well as in AML. Lifting banking secrecy under certain circumstances has also been embodied in a number of international legal instruments with the aim of cooperating in the fight against transnational crime.<sup>72</sup>

Under the international AML regime, national banking systems cultivating a tradition of stringent banking secrecy now have to harmonize with the new international standard of banking secrecy. The preventive measures, especially the reporting obligation, raise controversial questions whether there are conflicts between this obligation and the demand of banking secrecy, and whether this obligation has negative effects on the commercial interests of bankers.<sup>73</sup> The answers to these questions will depend on what the reported information is about, who it concerns, and what it will be used for.

It is noteworthy that the objectives of the preventive measures taken by banking systems not only serve the AML initiatives but also protect banking from reputational damage, loss of public confidence or other damages resulting from being used for criminal purposes.<sup>74</sup> Thus, banking systems should implement the preventive measures in compliance with international standards in order to protect themselves from the harms of money laundering. Further, the adequate implementation of the preventive measures has been seen as a market tool to guarantee the stability and health of banks in the global financial market.<sup>75</sup>

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<sup>71</sup> Walter, above n49, at 43-44.

<sup>72</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95, entered into force 11 November 1990, article 5(3); *United Nations Convention against Transnational Organised Crime*, 15 November 2000, 2225 UNTS 209, entered into force 29 September 2003, article 12(6); and FATF, above n20, R10.

<sup>73</sup> See e.g., Ping, above n41, at 380; and Antoinette Verhage, “Between the Hammer and the Anvil? The Anti-Money Laundering Complex and its Interaction with the Compliance Industry” (2008) 52(1) *Crime, Law and Social Change* 9 at 10.

<sup>74</sup> These potential damages were illustrated in chapter 2.

<sup>75</sup> Verhage, above n73.

However, bankers should not have to lift banking secrecy in unreasonable situations. For example, the lack of the appropriate standards of suspicious transactions may result in unreasonable reports being made to law enforcement agencies. These reports may affect the interests of the banker and its customers because of the financial information disclosed. The extent to which banking secrecy is relaxed depends on the balance between the interests of law enforcement and bankers. For instance, absolute banking secrecy should not exist when there is a criminal threat to the banking system; or when the higher interest of the public or State such as in case of fighting against crime is involved. Nevertheless, in practice, it is difficult to find the right balance between the two potentially competing interests.<sup>76</sup>

### **9.5.2      *Preventive Measures and Professional Secrecy***

Professional secrecy is a duty incumbent upon numerous professions, especially the religious, legal and medical professions. It is defined as a special moral duty upon members of the several professions, whereby they are obligated to maintain a virtuous or discreet silence in respect of confidential information they received in the course of duty.<sup>77</sup> In varying degrees, States have taken into account and made certain legal provisions about the duty of professional secrecy.

In common law States, confidential communication between lawyers or other legal professionals and their clients is protected by one of the oldest privileges in the history of common law - the legal professional privilege.<sup>78</sup> The legal professional privilege is defined as “the right whereby communications between client and legal adviser may not generally be given in evidence without the client’s consent if made in relation to contemplated or pending litigation, or made to enable the adviser to give, or the client to receive, legal advice”.<sup>79</sup> This includes the duty of a lawyer not to disclose professional communications with his client, the power of the client to stop the lawyer from making such disclosure, and the right of the client not to disclose the same.<sup>80</sup> This privilege is today treated as “absolute” in most common law jurisdictions and perceived as a fundamental human right.<sup>81</sup> In civil law States, for example in

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<sup>76</sup> Ping, above n41, at 380.

<sup>77</sup> Robert E. Regan and John T. Macartney, “Professional Secrecy and Privileged Communications” (1956) 2 *The Catholic Lawyer* 3 at 4.

<sup>78</sup> *Ibid*, at 5.

<sup>79</sup> L. B. (Leslie Basil) Curzon (ed) *Dictionary of Law* (6<sup>th</sup> ed, Pearson Education Limited, 2002 ) at 333.

<sup>80</sup> H. L Ho, “Legal Professional Privilege and the Integrity of Legal Representation” (2006) 9(2) *Legal Ethics* 163 at 163.

<sup>81</sup> *Ibid*, at 164.

Germany, protection of the confidentiality of the lawyer-client relationship is also afforded by constitutional principles.<sup>82</sup> In France, lawyers and notaries enjoy the privilege of non-disclosure, a fundamental basis of the confidential communication in their professional practice.<sup>83</sup>

The imposition of the preventive measures on professionals, like lawyers, notaries, accountants, tax advisers and other independent professionals, results in risks of: i) damaging the confidentiality of communication between professionals and their clients, or interfering in the individual right of privacy (in case of reporting obligations); and ii) subjecting them to criminal liability for their connection with money laundering operations, in particular as an accessory or accomplice to the money laundering offence. In fact, professionals may become involved unknowingly in money laundering operations, especially when they lack capacity and sufficient means to identify money laundering operations or suspicious transactions.<sup>84</sup> If they do become involved unknowingly, they may be prosecuted for committing the money laundering offence by negligence (the case, for example, in Germany<sup>85</sup>).

In order to prevent the risks and protect legal professional privilege and professional secrecy, a number of States and regional organisations have provided that certain cases should be exempted from reporting obligations. In the EU, for example, the EU Directive 2005/60/EC provides that States shall not be obliged to apply the reporting obligation to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to certain types of information.<sup>86</sup> This exemption aims to support the traditional role of legal advisers and representatives in legal proceedings on behalf of clients, such as undertaking advocacy for defendants or participating in lawsuits as a lawyer. However, notaries and other independent legal professionals shall be obliged to apply the reporting obligation when they participate, whether acting on behalf of and for their clients in any

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<sup>82</sup> Mitsilegas, above n48, at 148.

<sup>83</sup> Emmanuelle Chevrier, "The French Government's Will to Fight Organized Crime and Clean up the Legal Professions: The Awkward Compromise between Professional Secrecy and Mandatory Reporting" (2004) 42 *Crime, Law and Social Change* 189 at 189.

<sup>84</sup> See FATF (2013), "*Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*" at 23-28, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> (accessed 15 April 2014).

<sup>85</sup> "German Criminal Code (*English Translation by Prof. Dr. Michael Bohlander*)" (2009), available at: [http://www.gesetze-im-internet.de/englisch\\_stgb/german\\_criminal\\_code.pdf](http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf) (accessed 12 December 2012), article 261(5).

<sup>86</sup> *Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, 26 October 2005, 2005/60/EC, article 23(2).

financial transaction, or when assisting in the planning or execution of transaction for their clients.<sup>87</sup> Hence, whether the professionals shall be obliged to apply the preventive measures should depend on the nature of their activities.

## **9.6 Risk-based Approach (RBA), Financial Inclusion and Preventive Measures**

### **9.6.1 *Risk-based Approach***

As noted in chapter 3, since 2007, the FATF in collaboration with many private sector actors has worked extensively on the application of the RBA to AML/CFT.<sup>88</sup> In its 2012 revised Recommendations, the FATF introduced the RBA to its member countries as a central approach to adopting AML measures in general and the preventive measures in particular.<sup>89</sup> The general principle of the RBA is that the AML measures of a country should correspond to the risk level assessed, and that the intensity of AML measures (enhanced or simplified) depends on the level of the risks identified (higher or lower).<sup>90</sup> Where there are higher risks, countries *should* (obligatory for countries) require financial institutions and DNFBPs to take enhanced measures to manage and mitigate those risks; and where there are lower risks, simplified measures *may* (optional for countries) be allowed.<sup>91</sup> At the institutional level, financial institutions and DNFBPs should also be required to conduct money laundering risks assessment. The preventive measures, especially the CDD measures imposed on financial institutions and DNFBPs, should be enhanced or may be simplified when the level of the risks identified is respectively higher or lower.<sup>92</sup> The RBA is believed to enable countries as well as financial institutions and DNFBPs: i) to allocate their resources in the most efficient ways for AML; ii) to design and develop the FATF measures domestically commensurate with the nature of risks; and iii) to minimize the regulatory

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<sup>87</sup> Ibid, article 2(3).

<sup>88</sup> Actually, a number of principles of the RBA were introduced in the 2003 FATF Recommendations (see, e.g., R5, 6, 8, 20 and 24 of the 2003 FATF Recommendations). In 2005, the European Union incorporated the RBA into the Directive 2005/60/EC as a key approach to implementing the preventive measures (see *ibid*, Preamble, par. 18).

<sup>89</sup> FATF, above n20, R1; and INR 1.

<sup>90</sup> See *ibid*; and more in Louis de Koker, “The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks Within the New Standards Framework” (2013) 8(3) *Washington Journal of Law, Technology & Arts* 165 at 173-177.

<sup>91</sup> FATF, above n20, R1. The circumstances where the CDD should be enhanced or may be simplified are illustrated elsewhere in the previous section of the chapter.

<sup>92</sup> *Ibid*; and INR 1.

burden on financial institutions and DNFBPs and on their customers as well.<sup>93</sup> So, the RBA can be very helpful in implementing the AML measures.

Nevertheless, the RBA requires a reasonable risk judgement which is challenging to both the public and private sectors.<sup>94</sup> Implementing the RBA requires countries and financial institutions and DNFBPs within the countries to have a good understanding of money laundering risks and be able to make sound assessments. Over-estimating risk could result in wasteful use of resources and under-estimating risk may create vulnerabilities.<sup>95</sup> It is difficult for countries and their financial institutions to make appropriate risk assessments and determine correctly the extent to which the RBA could be implemented.<sup>96</sup> Furthermore, unfortunately there is no universal methodology for assessing money laundering risks.<sup>97</sup> The FATF only attempts to offer a general guidance on assessing money laundering risks at the national level.<sup>98</sup> Countries should by themselves design a matrix of indicating factors to identify and assess the risks of money laundering.<sup>99</sup> In the same vein, the FATF has collaborated with different parts of the private sector to produce general guidance papers on the implementation of a RBA for them.<sup>100</sup> According to these papers, at an institutional level, an overall assessment of money laundering risks is basically based on the determination of risks posed by various categories. The most commonly used risks categories are: customer risk; country/geographic risk; and products/services/ transactions risk.

### **9.6.2 Financial inclusion**

In general terms, financial inclusion involves providing access to adequate, transparent and affordable financial services to disadvantaged and other vulnerable groups who have

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<sup>93</sup> FATF (2007), *"Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures"* at 3, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf> (accessed 23 July 2013)

<sup>94</sup> Ibid, at 4.

<sup>95</sup> Ibid.

<sup>96</sup> See more in Koker, above n90, at 170.

<sup>97</sup> FATF (February 2013), *"National Money Laundering and Terrorist Financing Risk Assessment"* at par. 13, available at: [http://www.fatf-gafi.org/media/fatf/content/images/National\\_ML\\_TF\\_Risk\\_Assessment.pdf](http://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf) (accessed 23 July 2013).

<sup>98</sup> Ibid, par. 12-61.

<sup>99</sup> Ibid, Annex I and II.

<sup>100</sup> FATF, "Risk Based Approach", available at: <http://www.fatf-gafi.org/documents/riskbasedapproach/> (accessed 19 June 2014).

been “underserved” or excluded from the formal financial sector.<sup>101</sup> Disadvantaged and other vulnerable groups are, for example, low income households, rural persons and undocumented migrants.<sup>102</sup> The “underserved” persons are those who have access to some financial services, but in a very limited manner. For example, they may have access to a money transfer service, but not from banks, or they may technically have access but are not using the services because of some obstacles, such as strict documentary requirements, habit, limited knowledge or high cost.<sup>103</sup> It has been shown that most of those people in the world who lack access to banks and other formal financial institutions are living in developing countries, and that alternative remittance systems (ARs) are being used to transfer a significant amount of money to developing countries.<sup>104</sup>

Financial inclusion and effective AML measures can be mutually supportive. Some studies point out that more access to formal financial services result in an increase of effectiveness of the AML measures. And the imposition of inappropriate AML measures, especially the preventive measures, can negatively affect access to and use of formal financial services.<sup>105</sup> Thus, promoting formal financial services access and the appropriateness of AML measures are the central initiatives to an effective AML regime. The preventive measures should have a flexibility that enables countries and financial institutions to craft the most efficient implementation.

The FATF has recently taken a strong interest in the issue of financial inclusion.<sup>106</sup> FATF Ministers stated that financial exclusion poses a real threat to effective implementation of the FATF Recommendations.<sup>107</sup> The FATF has worked with the Asia Pacific Group (APG) and

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<sup>101</sup> FATF (2013), *"FATF Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion"* at par. 17, available at: [http://www.fatf-gafi.org/media/fatf/documents/reports/AML\\_CFT\\_Measures\\_and\\_Financial\\_Inclusion\\_2013.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/AML_CFT_Measures_and_Financial_Inclusion_2013.pdf) (accessed 24 July 2013).

<sup>102</sup> Ibid, par. 21.

<sup>103</sup> Ibid.

<sup>104</sup> WB, “The Global Financial Inclusion (Global Findex) Database”, available at: <http://econ.worldbank.org/> (accessed 24 July 2013).

<sup>105</sup> Hennie Bester, et al., *"Implementing FATF Standards in Developing Countries and Financial Inclusion: Findings and Guidelines"* at vi, available at: [http://www.cenfri.org/documents/AML/AML\\_CFT%20and%20Financial%20Inclusion.pdf](http://www.cenfri.org/documents/AML/AML_CFT%20and%20Financial%20Inclusion.pdf) (accessed 24 July 2013), at 26-28; and Jennifer Isern and Louis de Koker, *"AML/CFT: Strengthening Financial Inclusion and Integrity"* (Consultative Group to Assist the Poor, August 2009) at 2, available at: <http://www.cgap.org/sites/default/files/CGAP-Focus-Note-AML-CFT-Strengthening-Financial-Inclusion-and-Integrity-Aug-2009.pdf> (accessed 24 July 2013).

<sup>106</sup> In June 2010, the FATF discussed the issue on the first day of its plenary meetings. See FATF, “Outcomes of the FATF Plenary meeting, Amsterdam, 23-25 June 2010”, available at: <http://www.fatf-gafi.org/pages/aboutus/outcomesofmeetings/>.

<sup>107</sup> FATF (2013), above n101, par. 2.

the World Bank (WB) to produce a guidance paper on action to support financial inclusion,<sup>108</sup> especially in emerging economies, developing countries and Low Capacity Countries.<sup>109</sup> The guidance paper provides a general framework to assist countries in implementing the AML measures (CDD, record-keeping and STRs obligations, and other measures) consistent with the purposes of financial inclusion.<sup>110</sup> It also clarifies the flexibility offered by the FATF, in particular through the RBA, when promoting financial inclusion. For example, countries are exempt from applying some of the FATF measures to financial institutions when:<sup>111</sup> i) there is a proven low risk of money laundering and terrorist financing in strictly limited and justified circumstances; and ii) a financial activity (other than the transferring of money or value) is carried out by a natural or legal person on an occasional or very limited basis with low risks of money laundering and terrorist financing. Nevertheless, these provisions are vague. Countries are free to justify and interpret the circumstances and financial activities which have a low risk of money laundering.

## 9.7 Interim Conclusion

In brief, ensuring the adequate implementation of the preventive measures is highly important for financial institutions and DNFBPs to be secure from money laundering. Nonetheless, the enforcement of these measures is becoming much more intrusive into financial privacy, professional secrecy and privilege, which are themselves strongly justified by legitimate and undisputed rationales. This leads to tension and potential conflicts of interests between law enforcement authorities and financial service providers or professionals, between the protection of privacy rights and the objectives of the preventive measures. In practice, financial privacy, professional secrecy and privilege should be weighted fairly against the objectives of preventive measures in AML. In addition, financial institutions and DNFBPs should be equipped with sufficient means and capacity for effective

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<sup>108</sup> The first version was adopted in June 2011, which was then revised in February 2012. See *ibid.*

<sup>109</sup> LCC is generally characterized by the FATF as a low income country with the following features: i) competing priorities for scarce government resources; ii) severe lack of resources and skilled workforce to implement government programmes; iii) overall weakness in legal institutions; iv) dominant informal sector and cash-based economy; v) poor documentation and data retention systems; and vi) very small financial sector. See FATF, *"Guidance on Capacity Building for Mutual Evaluations and Implementation of the FATF Standards within Low Capacity Countries"* (29 February 2008) at 4-5, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Capacity%20building%20LCC.pdf> (accessed 24 July 2013).

<sup>110</sup> FATF (2013), above n101, pars. 61-145.

<sup>111</sup> FATF, above n20, INR1, par. 6.

customer identification to prevent the risk of becoming involved unknowingly in money laundering.

The RBA obviously has various laudable aims. Nevertheless, its implementation in fact could be challenging to countries and institutions because of the difficulties in money laundering risks assessment. It is unlikely to offer universally accepted detailed guidelines or methodologies to all countries and institutions for assessing correctly money laundering risks. In addition, countries and institutions may lack of resources in evaluating money laundering risks. Thus, they are wary of undertaking the risk assessment.

The chapter now turns to examine the implementation of the preventive measures in Vietnam. It begins with an overview of the principal financial institutions, and designated non-financial businesses and professions.

## **9.8 Overview of Vietnamese Financial Institutions, Designated Non-Financial Businesses and Professions**

### **9.8.1 *Financial Institutions***

#### *Banks*

Vietnam's banking sector has expanded substantially in recent years. As part of the country's move towards a more open and market-oriented economy, the Vietnamese government has vigorously undertaken various reforms to strengthen and modernize the banking sector in compliance with international standards. These reforms have also been motivated by Vietnam's growing participation in international trade and international agreements. Key reforms include a restructuring of the banking system, a gradual opening to foreign investment, the partial privatization of 100% State-Owned Banks and an increase in retail banking services.<sup>112</sup>

The Vietnamese banking system currently consists of the State Bank of Vietnam (SBV), five State-Owned Commercial Banks (SOCBs), 34 Joint Stock Commercial Banks (JSCBs), four Joint Venture Banks (JVBs) and five wholly foreign-owned banks.<sup>113</sup> Similarly to central banks in other States, the SBV is vested with authority to make monetary policy and

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<sup>112</sup> Federal Reserve Bank of San Francisco (2011), "Banking Reform in Vietnam", available at: <http://www.frbsf.org/banking-supervision/publications/asia-focus/2011/june/banking-reform-vietnam/june-banking-reform-in-vietnam.pdf> (accessed 22 July 2013).

<sup>113</sup> SBV (30 June 2013), "He Thong To Chuc Tin Dung [Credit Institution System]", available at: <http://www.sbv.gov.vn/> (accessed 22 July 2013).



govern the banking system. SOCBs are government-owned banks that primarily fulfill specialized policy lending functions. These banks dominate the banking sector in Vietnam with their branches across the country. JSCBs have diverse shareholding structures, ranging from purely private organizations to being jointly owned by State-Owned Enterprises (SOEs), private groups and individuals. JVBs are established with capital contributed by a Vietnamese bank and one or more foreign banks under a joint venture contract. In addition, recently an increasing number of wholly foreign-owned banks have been licensed and allowed to provide the same range of banking services as domestic banks in Vietnam. These banks are perceived as having a comparative advantage over domestic banks, such as high quality retail banking services and wealth management services.

Almost all commercial banks now offer a full range of banking products and services to satisfy the increasing demands of corporate and retail clients. Beside the traditional products, such as personal loans and mortgages, other products have become available, for example, credit/debit cards, Automated Teller Machines (ATMs), remittances and electronic payments. However, the Vietnamese banking system is perceived as still weak and inefficient by international standards, for example, in terms of services, management and capacity.<sup>114</sup>

#### *Securities companies*

By the end of 2012, there were 106 securities companies, mostly private, although there were some State-Owned Bank-affiliated institutions.<sup>115</sup> In order to trade on Vietnam's stock market, investors must have a custodian account in Vietnam. Foreigners are allowed to hold such accounts. New clients of securities companies are required to open a bank account with an affiliated bank.

The State Securities Commission (SCC), a governmental agency, is responsible for enforcing the Law on Securities and regulating Vietnam's securities market.<sup>116</sup> The Vietnamese Securities Depository is a centralized share registry for all publicly listed companies.<sup>117</sup> Buying and selling of securities is conducted through the securities companies licensed by the SCC.<sup>118</sup>

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<sup>114</sup> "ADB wants reform of Vietnam's banks, SOEs", *Thanh Nien News*, 10 August 2012, available at: <http://www.thanhniennews.com/index/pages/20120810-adb-says-to-support-vietnam-in-banking-soe-reforms.aspx> (accessed 22 July 2013).

<sup>115</sup> SCC (2013), available at: <http://www.ssc.gov.vn/> (accessed 23 July 2013).

<sup>116</sup> *Luat Chung Khoan [Law on Security Sector]* (Vietnam) Law No. 70/2006/QH11, 29 June 2006, entered into force 01 January 2007, article 8.

<sup>117</sup> *Ibid*, articles 42-46.

<sup>118</sup> *Ibid*, article 33.

### *Insurance companies*

As of January 2013, in Vietnam, there were 29 non-life insurance providers and 14 life insurance providers.<sup>119</sup> Foreign insurers can participate in the Vietnam's insurance market in the following ways: establishing a wholly-owned subsidiary in Vietnam; entering into a joint venture with Vietnamese insurers; acquiring stakes in joint stock insurance companies; establishing a branch of a foreign insurance company in Vietnam; or providing cross-border insurance services into Vietnam.<sup>120</sup> Several international insurers have established representative offices in Vietnam, including Taiwan, Japanese, the US, Swiss, South Korean or Italian-owned insurers. Insurance companies are regulated by the Ministry of Finance through its Insurance Supervisory Authority.<sup>121</sup>

### *Other financial institutions*

There is a system of People's Credit Funds ("*Quy tin dung nhan dan*") which is a form of cooperative micro finance at the community level. These funds collect deposits from both members and non-members. Their operations are subject to the Law on Credit Institutions<sup>122</sup> and regulated by the SBV.

Currency exchange units, including banks and other financial institutions, are authorized to conduct currency exchange activities. The currency changers operate under the SBV's supervision and the Ordinance on Foreign Exchange.<sup>123</sup> Additionally, there are a large number of unlicensed money changers, known as "black market operators", in Vietnam. Many of them are gold retail shops.

In Vietnam, the legal system of money or value transfer mainly consists of commercial banks, Western Union, Money Gram, Pay Pal and Vina USA.

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<sup>119</sup> Frasers Law Company (01 January 2013), "*Vietnam Insurance Law Update*" at 1, available at: <http://www.frasersvn.com/wp-content/uploads/2013/01/Legal-Update-Insurance-Sector-Jan-2013-EN-00020347.pdf> (accessed 22 July 2013).

<sup>120</sup> Ibid, at 2.

<sup>121</sup> Vietnam Insurance Portal, available at: <http://webbaohiem.net/danh-ba.html> (accessed 23 July 2013).

<sup>122</sup> Luật Các Tổ Chức Tín Dụng [*Law on Credit Institutions*] (Vietnam) Law No. 47/2010/QH12, 16 June 2010, entered into force 01 January 2011.

<sup>123</sup> Ủy Ban Thường Vụ Quốc Hội, "Pháp Lệnh Ngoại Hối" [*Standing Committee of the National Assembly, Ordinance on Foreign Exchange*] No. 28/2005/PL-UBTVQH11 (Vietnam), 13 December 2005, entered into force 1 June 2006 [*Ordinance on Foreign Exchange*].

### 9.8.2 *Designated Non-Financial Businesses and Professions*

#### *Casinos*

Gambling has long been considered a “social evil” by Vietnamese authorities. Nevertheless, the government has given special dispensation to a number of high standard hotels (4 – 5 stars) to open slot machines, electronic games operations and table games room for foreigners only.<sup>124</sup> Some small-size casinos are open solely to holders of foreign passports.<sup>125</sup> The market is targeted at foreigners, primarily those working in or visiting Vietnam. There are no legal internet casinos operating in Vietnam. Nevertheless, illegal and unregulated gambling, such as internet gambling on European football matches organized by underground gambling syndicates, is popular in big cities.

In recent years, the government appears to have loosened its straight-laced attitude to gambling. A proper policy and legal framework for the gambling market has been considered.<sup>126</sup> The supervision of casino operations is multi-faceted.<sup>127</sup> The People’s Committee in the Provinces where casinos are located comprehensively oversees the activities of licensed casinos. The Ministry of Planning and Investment is responsible for ensuring compliance with business registration requirements. The SBV supervises foreign exchange and money transfer activities.

#### *Real estate agents*

One of the weaknesses of the real estate market of Vietnam is the lack of professionalism and legal framework for brokerage agencies’ activities. The Law on Real Estate Business (2006) directly regulates real estate brokers and agents in Vietnam, which requires brokers to be licensed by obtaining a practice certificate.<sup>128</sup> In fact, with regard to the residential property market, the number of trained licensed individuals and legal entities is relatively

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<sup>124</sup> MGM Resorts International and Asian Coast Development Limited have been licensed to develop the MGM Grand Ho Tram Beach - Viet Nam's first large-scale of the US\$4.2 billion casino resort. The five-star MGM Grand Ho Tram was open in 2013, offering a gaming area consisting of 90 live table games and more than 600 electronic games. See Asian Coast Development Ltd. (2013), available at: <http://www.asiancoastdevelopment.com/mgm-grand-ho-tram.php> (accessed 8 March 2013).

<sup>125</sup> For example, Do Son Casino in Hai Phong Province.

<sup>126</sup> In Chinh Phu, “Du Thao Nghi Dinh Ve Hoat Dong Kinh Doanh Casino ” [*Government, Draft on Government Decree on Managing Casino Operations*] (Vietnam), 2012, casino players include Vietnamese people.

<sup>127</sup> See *ibid*, chapter VI.

<sup>128</sup> Luật Kinh Doanh Bat Dong San [*Law on Real Estate Business*] (Vietnam) Law No. 63/2006/QH11, 29 June 2006, entered into force 01 January 2007, article 8.

small. A large number of freelance brokers are self-appointed agents, who use word-of-mouth and personal contacts to try to locate potential land or houses for buyers or renters. They may or may not be the sole representative of the landlord or owner, and they receive their commission from the landlord or owner. Real estate agents are normally not involved in accepting payments. Payment is often conducted directly between sellers and buyers. Vietnam Dong (VND), gold and US\$ are preferable in payments between individuals. Land or house transaction documentation must be signed and notarized by a notary. Tax on the transaction must be paid at the tax department after the deeds are signed and notarized.

#### *Lawyers, notaries and accountants*

As of October 2013, Vietnam had about 8,000 lawyers.<sup>129</sup> The number of lawyers per capita in Vietnam, the number of legal consultant companies and the demand for legal aid is very low, especially in rural areas. The role of lawyers in Vietnamese society has only been promoted in recent decades. The practice of lawyers in Vietnam is governed by the Law on Lawyers of 2006<sup>130</sup> and a number of Decrees and Regulations.

The Vietnam Bar Federation (VBF), established in 2009, is the nationwide socio-professional organization of Vietnamese lawyers. VBF represents and protects the legitimate rights and interests of its members; sets up and promotes professional standards, ethics and competence of the lawyers. In 2011, the VBF promulgated the Code of Ethics and Professional Conduct.<sup>131</sup> Lawyers are required to be a member of the Bar Associations and be qualified based on a national examination. Nevertheless, the professional level and legal knowledge of lawyers in numerous areas is limited.

Regarding notarial practice, there are two forms of Notary Public organizations: State Notary Public's chambers and Private Notary Public's offices.<sup>132</sup> The former, established by provincial People's Committee's decision, is a unit under the Ministry of Justice, and its members of staff are government officials. The latter is established by a notary or notaries in the form of a private company or collective enterprise respectively.

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<sup>129</sup> The Vietnam Bar Federation (2013), available at: <http://liendoanluatsu.org.vn/> (accessed 15 April 2014).

<sup>130</sup> Luật Luật Sư [Law on Lawyers] (Vietnam) Law No. 65/2006/QH11, 29 June 2006, entered into force 01 January 2007, as amended by on 20 November 2012.

<sup>131</sup> Quy Tắc Đạo Đức và Ứng Xử Nghề Nghiệp Luật Sư Việt Nam [Code of Ethics and Professional Conduct] (Vietnam) No. 68/QĐ-HDLSTQ, 20 July 2011.

<sup>132</sup> Luật Công Chung [Law On Notary] (Vietnam) Law No. 82/2006/QH11, 29 November 2006, entered into force 01 July 2007, articles 24 and 26.

As far as accountants are concerned, the profession of accountants in public practice and internal accountants is regulated by the Law on Accountancy of 2003.<sup>133</sup> It provides the professional and ethical requirements for an accountant. In addition, in order to practice as Certified Public Accountants, membership of the Vietnam Association of Certified Public Accountants (VACPA) is required.

#### *Dealers in precious metals and precious stones*

In Vietnam, gold serves a variety of crucial functions beyond jewelry fabrication and industrial applications. Gold has been used and continues to be used extensively as in-kind savings (including interest-bearing gold certificates of deposit) and monetary instrument for commercial transaction (e.g., in trading real properties). Legal gold businesses, including pressing gold bars, import and export of gold material, gold ore or grain, must be authorized by the SBV. Gold is categorized as a “foreign exchange” in current laws.<sup>134</sup> As of December 2012, there were around 3,000 licensed gold businesses entrepreneurs and thousands of retail gold shops.<sup>135</sup>

### **9.9 The Application of Preventive Measures on Vietnamese Financial Institutions, Designated Non-Financial Businesses and Professions**

#### **9.9.1 Customer Due Diligence and Record Keeping**

##### *Customer due diligence*

In 2008, the APG, in its mutual evaluation report, revealed substantial shortcomings regarding CDD in the first formal AML legal document of Vietnam – the Decree 74/2005/ND-CP.<sup>136</sup> However, the adoption of the Law on Prevention and Suppression Money

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<sup>133</sup> Luật Kế Toán [*Law on Accountancy*] (Vietnam) Law No. 03/2003/QH11, 17 June 2003, entered into force 01 January 2014, articles 55-58.

<sup>134</sup> *Ordinance on Foreign Exchange*, above n123.

<sup>135</sup> State Bank of Vietnam, “*Annual Report*” 2013, at 2.

<sup>136</sup> Chính Phủ, “Nghị Định của Chính Phủ về Phòng, Chống Rửa Tiền” [*Government, Government Decree on Prevention and Suppression of Money Laundering*] No. 74/2005/ND-CP (Vietnam), 7 June 2005 [*Government Decree 74/2005/ND-CP*]. See APG (2009), “VIETNAM ME1 (Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism)”, available at: <http://www.apgml.org/documents/docs/17/Vietnam%20ME1.pdf> (accessed 20 April 2013).

Laundrying (Law on PSML)<sup>137</sup> and the Decree 116/2013/ND-CP<sup>138</sup> has addressed most of those shortcomings.

Article 8(1) of the Law on PSML and articles 3 of the Decree 116/2013/ND-CP prescribe certain circumstances in which financial institutions must conduct customer identification. In comparison with the FATF standards, the *de minimis* thresholds for occasional customers conducting wire transfer is not provided for in Vietnamese law.<sup>139</sup> However, this provision is optional under the FATF Recommendation, so Vietnam may not need to implement it.

Furthermore, customer identification must be undertaken by other individuals and entities listed in article 8(2) of the Law on PSML, which are consistent with the FATF definitions of non-designated businesses and professions. Articles 6 and 7 of the Circular 148/2010/TT-BTC refer to the details of customer identification in the sectors of insurance, securities and games of chance.<sup>140</sup> Detailed CDD in the real estate business is provided for in the Circular 12/2011/TT-BXD on Anti-Money Laundering in the Real Estate Sector.<sup>141</sup>

The following CDD measures are provided for in articles 11(1) and (2) of the Law on PSML, which comply with the measures stated in R10(a) and (c) of the 2012 FATF Recommendations.

1. The reporting entities shall use the following documents and data to verify customers' identification:
  - a) For customers being individuals: identity card, valid passport and other documents issued by the competent authorities;

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<sup>137</sup> Luật Phòng, Chống Rửa Tiền [*Law on Prevention and Suppression of Money Laundering*] (Vietnam) Law No. 07/2012/QH13, 18 June 2012, entered into force 1 January 2013.

<sup>138</sup> Chính Phủ, "Nghị Định Quy Định Chi Tiết Thi Hành Một Số Điều Của Luật Phòng, Chống Rửa Tiền" [*Government, Decree on Guiding the Implementation of the Law on Prevention and Suppression of Money Laundering*] No. 116/2013/ND-CP (Vietnam), 04 October 2013 [*Decree 116/2013/ND-CP*]. This Decree has replaced the Decree 74/2005/ND-CP.

<sup>139</sup> FATF, above n20, R10; and INR 16, par. 6.

<sup>140</sup> Bộ Tài Chính, "Thông Tư Hướng Dẫn Thực Hiện Các Biện Pháp Phòng, Chống Rửa Tiền Đối Với Lĩnh Vực Bảo Hiểm, Chung Khoan và Trò Chơi Có Thuộc" [*Ministry of Trade, Circular 148/2010/TT-BTC on Guiding the Implementation of Measures to Prevent and Combat Money Laundering in Insurance, Securities Sector and Games of Chance*] No. 148/2010/TT-BTC (Vietnam), 14 September 2010 [*Circular 148/2010/TT-BTC*].

<sup>141</sup> Bộ Xây Dựng, "Thông Tư Hướng Dẫn Thực Hiện Một Số Nội Dung của Nghị Định số 74/2005/ND-CP Ngày 07 Tháng 6 Năm 2005 của Chính Phủ Về Phòng, Chống Rửa Tiền Đối Với Hoạt Động Kinh Doanh Bất Động Sản" [*Ministry of Construction, Circular on Guiding the Implementation of a Number of Articles of Government Decision No. 74/2005/ND-CP 7 June 2005 to Prevent and Combat Money Laundering in Real Estate Business*] No. 12/2011/TT-BXD (Vietnam), 1 September 2011 [*Circular 12/2011/TT-BXD*], articles 6 and 7.

- b) For customers being organizations: the license or the establishment decision; the decision on the name change, division, merger; business registration certificate; and the decision of appointing Director, Chief Accountant;
- 2. The reporting entities through other organizations and individuals which have had a relation with the customer, or through competent State agencies to collect information and compare with that provided for by the customer.

It is noticeable that there is no national centralized identification system for natural persons and no centralized and publicly accessible database of registered enterprises in Vietnam. The identity card (“*chung minh thu nhan dan*”), which includes ID number, full name, place of origin, date of birth, place of residence, nationality, special marks, fingerprints of left and right thumbs, and the stamp of the local police authority, is the primary and most reliable means of identification.

Ongoing due diligence is provided for in article 10 of the Law on PSML, which is in compliance with R10(d) of the 2012 FATF Recommendations. Nevertheless, because there is no centralized identification system and the identity card used as the primary document for customer identification carries no obligation to maintain up-to-date information (e.g., place of residence), it is difficult for financial institutions to engage in ongoing due diligence.

Identification of the beneficial owner is provided for fully in article 9(2) of the Law on PSML as follows:

2. Information on the beneficial owner:

- a) Reporting entities shall identify the beneficial owner and use the measures to identify and update the information on beneficial owner;
- b) For customer being a legal entity or upon the provision of authorization agreement service, the reporting entities shall gather information on ownership and control structure to determine the individual who has the control interest and govern the operation of that legal entity or authorization agreement.

These provisions are consistent with R10(b) of the 2012 FATF Recommendations.

### *Record keeping*

Article 9(1)(a) and (b) of SBV Decision 376/2003 concerning the Regulations on Storing Electronic Banking Documents states that:<sup>142</sup>

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<sup>142</sup> Ngân Hàng Nhà Nước Việt Nam, “Quyết Định của Thông Đốc Quy Định về Bảo Quản, Lưu Trữ Chung Tu Điện Tử Đa Sử Dụng Để Hạch Toán và Thanh Toán Vốn Của Các Tổ Chức Cung Ứng Dịch Vụ Thanh Toán

- a. Electronic documents related directly to record-keeping in the institutions that provide payment services shall be stored up to twenty years from the end of accounting year or when completing capital accounting payment of such institutions;
- b. Electronic documents that are only used for managing, operating and controlling, crosschecking in capital payment activities of the institutions that provide payment services, and use indirectly in record-keeping shall be stored up to five years from the end of accounting year or when completing capital accounting payment of institutions that provide payment services;

Article 40(5) of the Law on Accountancy provides that accounting records must be archived for the following specified period of time:<sup>143</sup>

- a) At least five years: accounting documents used for the accounting units' management and administrative work, including accounting documents not directly used for making accounting books and financial reports;
- b) At least ten years: accounting documents directly used for making entries in accounting books and financial statements; accounting books; and annual financial reports, unless otherwise provided for by law;
- c) Permanently: accounting documents which have the historical value; or the economic, security or defence importance.

The retention of transaction records, account files and business correspondence has recently been required by article 27 of the Law on PSML:<sup>144</sup>

The reporting entities are required to archive for at least 05 years: the customer's transaction records from the date of the transaction initiated; the records of customer identification, accounting documents, reports specified in article 21, 22 and 23 of this Law and other relevant documents, from the closing date of transaction or the date of closure of account or the reporting date.

It can be seen that the current laws regulating the obligation of record keeping are consistent with the FATF Recommendations.

Anecdotal information suggests that electronic banking documents and accounting records have been stored in full compliance with article 9(1)(a) and (b) of SBV Decision 376/2003

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" [State Bank of Vietnam, *Regulation on Storing Electronic Banking Documents*] No. 376/2003/QĐ-NHNN (Vietnam), 22 April 2003, article 9(1).

<sup>143</sup> *Law on Accountancy*, above n133.

<sup>144</sup> *Government Decree 74/2005/ND-CP*, above n136



and the Law on Accountancy respectively, but there is no way of knowing whether this is in fact the case.

### **9.9.2 Reporting Obligation**

Article 21(1) of the Law on PSML and article 3 of the Decision 20/2013/QĐ-TTg requires reporting of large value transactions which have an equivalent value of three hundred million VND (around 15,000 US\$).<sup>145</sup>

In addition, the obligation of reporting suspicious transaction was first mentioned in the Decree 74/2005/ND-CP,<sup>146</sup> and then specified in the Circular 148/2010/TT-BTC<sup>147</sup> and the Circular 12/2011/TT-BXD.<sup>148</sup> Article 22(1) of the Law on PSML stipulates STR obligations as follows: “the reporting entities are required to report to the State Bank of Vietnam when there are suspicions or reasonable grounds to suspect that the property in the transaction is the proceeds of a criminal activity or are related to money laundering”. Further, comprehensive categories of grounds to suspect transactions in the sectors of banking, securities, casino and games of chance, and real estate are also provided for in the PSML Law.<sup>149</sup>

Article 28 of the Law on PSML exempts the responsibility of protecting banking secrecy in certain circumstances by providing that “agencies, organizations and individuals which discharge their obligation to report or provide information in accordance with this law shall be deemed not to have breached the legal provisions on confidentiality of deposited money, assets, account information and transaction information of customers”. Article 29 of the Law on PSML stipulates the prohibition against disclosure (tipping-off) of the fact indicating that a STR or the information related to that STR is being filed.

In practice, since the launch of Decree 74/2005/ND-CP, the number of STRs received by the Anti-Money Laundering Department (AMLD) has increased steadily.<sup>150</sup> Most STRs were

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<sup>145</sup> Thu Tuong Chinh Phu, “Quyết Định Quy Định Mức Giá Trị Của Giao Dịch Có Giá Trị Lớn Phải Báo Cáo” [*The Prime Minister, Decision on Setting the Value of Transactions Subject to Reporting Obligation*] No. 20/2013/QĐ-TTg (Vietnam), 18 April 2013 (entered into force 10 June 2013) [*Decision 20/2013/QĐ-TTg*].

<sup>146</sup> *Government Decree 74/2005/ND-CP*, above n136, articles 10 and 12.

<sup>147</sup> *Circular 148/2010/TT-BTC*, above n140, articles 9 and 10.

<sup>148</sup> *Circular 12/2011/TT-BXD*, above n141, article 9.

<sup>149</sup> *Law on Prevention and Suppression of Money Laundering*, above n137, article 22(2), (3), (4), (5), (6) and (7).

<sup>150</sup> SBV, “Báo Cáo Tổng Kết Sau Năm Thi Hành Nghị Định 74/2005/ND-CP về Phòng, Chống Rửa Tiền” [*Report on Result of the Implementation of Decree 74/2005/ND-CP in six years*] No. 109 /BC-NHNN, 7 September 2011 at 8. The number of STRs in 2007, 2008, 2009, 2010 and 2011 was 12, 39, 93, 326 and 304 respectively. In 2012, the total value of STRs reported was roughly 51,000 billion VND (equivalent to

reported by the banking sector. There has been no STR reported from lawyers and accountants. An insignificant number of STRs received by the AMLD were then forwarded to the Ministry of Public Security for further investigation.<sup>151</sup>

Sanctions may be imposed on individuals or organizations which violate the reporting obligation or inform the related parties about the content of the report.<sup>152</sup> The sanction may be criminal liability, monetary fine or administrative penalties. However, in fact, these penalties have not been applied to any individual or organization. This may undermine the rule of law and hinder the implementation of the reporting obligation in fact. More importantly, from this fact, the political will to implement the AMLSs in practice is questionable.

Another obligatory report to the Customs Office of Vietnam is imposed on individuals who entry into or exit from Vietnam carrying foreign currencies in cash of more than US\$5,000 or Vietnam Dong of more than VND15 million.<sup>153</sup>

### **9.9.3      *Financial Institution Privacy and Confidentiality***

#### *Instruments of banking secrecy*

It is worthy of note that anonymous accounts and numbered accounts are prohibited in Vietnam. The Decision 1284/2002/QĐ-NHHH on Opening and Use of Deposit Accounts at the State Bank of Vietnam and Credit Institutions requires the full name of the account holder to be provided for.<sup>154</sup> “Shell companies” and “captive banks” likewise are not allowed to be established in Vietnam. It means that Vietnamese banks provide only “classic named account”.

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around 2.5 billion US\$), see Nguyen Hien (2013) "Gan 51.000 Ti Dong Giao Dich "Dang Ngo" Ve Rua Tien [Around 51,000 billion VND of Money Laundering "Suspicious Transactions"]", available at: <http://dantri.com.vn/kinh-doanh/gan-51000-ty-dong-giao-dich-dang-ngo-ve-rua-tien-770757.htm> (accessed 16 April 2014).

<sup>151</sup> SBV, above n150. In 2012, 160 STRs were forwarded to the Ministry of Public Security (see Nguyen Hien, above n150).

<sup>152</sup> *Law on Prevention and Suppression of Money Laundering*, above n137, article 35.

<sup>153</sup> Ngan Hang Nha Nuoc Vietnam, “Thong Tu Quy Dinh Ve Viec Mang Ngoai Te Tien Mat, Dong Viet Nam Tien Mat Cua Ca Nhan Khi Xuat Canh, Nhap Canh” [SBV, *Circular Regulation on Carrying Foreign Currencies and Vietnam Dong in Cash by Individuals on Entry into and Exit from Vietnam*] No. 15 / 2011/TT-NHNN (Vietnam), 12 August 2011, article 2(1).

<sup>154</sup> Ngan Hang Nha Nuoc Viet Nam, “Quyét Dinh ve Quy Che Mo va Su Dung Tai Khoan Tien Gui Tai Ngan Hang Nha Nuoc va Cac To Chuc Tin Dung” [State Bank of Vietnam, *Decision on Opening and Use of Deposit Accounts at State Bank of Vietnam and Credit Institutions*] No. 1284/2002/QĐ-NHHH (Vietnam), 21 November 2002, article 5.

### *Financial privacy and professional privilege*

Article 14 of the Law on Credit Institution (2010) stipulates the confidentiality of information as follows:<sup>155</sup>

1. Employees, managers, executives of credit institutions and foreign bank branches are prohibited from disclosing the confidential business of the credit institutions and foreign bank branches.
2. Credit institutions and branches of foreign banks must ensure the confidentiality of information relating to accounts, deposited money or assets and customer's transactions at the credit institutions and branches of foreign banks.
3. Credit institutions and branches of foreign banks are prohibited from providing information related to accounts, deposited money or assets, customer's transactions at credit institutions and branches of foreign banks to other organizations or individuals, unless otherwise required by competent state agencies under the provisions of law or the consent of the customer.

Article 57 of the Law on Securities, which deals with confidentiality, states that a "securities Depository and its staff members shall ensure the confidentiality of information related to securities ownership; refuse investigation, freezing, withholding and transfer of customer's assets without the customer's consent".<sup>156</sup>

Nevertheless, the Law on Securities allows the "provision of information at the request of competent State authorities".<sup>157</sup> What is more, the Decree 70/2000/ND-CP allows financial institutions to provide customer account information "at the written request of State agencies in the course of inspection, investigation, prosecution, court trial or judgment execution which falls under their competence, as prescribed by law".<sup>158</sup> The Decree 64/2001/ND-CP on Payment through Service Providers stipulates that "service providers including banks and other organizations permitted to provide payment services are obliged to supply to the State Bank information related to payment activities at such organizations at the request of State Bank".<sup>159</sup> In addition, "organizations and individuals involved in foreign currency exchange activities are obliged to supply information and data at the request of the State Bank of

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<sup>155</sup> *Law on Credit Institutions*, above n122.

<sup>156</sup> *Law on Security Sector*, above n116, article 57(1).

<sup>157</sup> *Ibid*, article 57(2)(c).

<sup>158</sup> Chinh Phu, "Nghị Định Về Việc Giữ Bí Mật, Lưu Tru và Cung Cấp Thông Tin Liên Quan Đến Tiền Gửi và Tài Sản Gửi Của Khách Hàng" [*Government, Decree on Keeping Secret, Archiving, and Providing Information Related to the Customers' Deposit Money and Properties*] No. 70/2000/ND-CP (Vietnam), 21 November 2000 [ *Decree No. 70/2000/ND-CP*], article 5(b).

<sup>159</sup> Chinh Phu, "Nghị Định Về Hoạt Động Thanh Toán Qua Các Tổ Chức Cung Ứng Dịch Vụ Thanh Toán" [*Government, Decree on Payment through Service Providers*] No. 64/2001/ND-CP (Vietnam), 20 September 2001, article 24(4).

Vietnam or licensed credit institutions according to the time limits provided for in current laws regulating foreign currency exchange activities”.<sup>160</sup> Article 17 (2) of the Decree 116/2013/ND-CP expressly spells out that the AMLD is authorized to request the reporting entities and other relevant individuals/organizations to provide information related to the reported transactions.<sup>161</sup>

Rule 12 of the Code of Ethics and Professional Conduct prohibits disclosing the communication between lawyers and their clients, unless the clients consent or the law requests disclosure in certain circumstances.

It can be seen that although the laws on regulating financial services and the Code of Ethics contain provisions which prohibit the disclosure of customer information, these provisions are normally overridden by requests submitted by competent authorities for certain purposes, including the purpose of AML.

#### **9.9.4 Risk-based Approach and Financial Inclusion**

As noted in chapter 2, although the Vietnamese authorities have been aware of the existence of actual money laundering in Vietnam, they have not yet conducted any comprehensive research to identify, assess and understand money laundering risks to Vietnam. Likewise, although article 12 of the Law on PSML provides the guidance for financial institutions and DNFBPs to categorise their clients based on the RBA, guidance on the methods of assessing the risk level of financial institutions and DNFBPs is not provided for. The CDD measures are enhanced in certain situations prescribed in articles 13-17 of the Law on PSML which are similar to the FATF’s provisions (R12 to R16). Nevertheless, the circumstances where the simplification or exemption of preventive measures application is allowed have not been specified. In addition, the lack of expertise in conducting risks assessment at both the national and institutional level is a major hindrance to adopting the RBA in Vietnam.

With regard to financial inclusion, chapter 3 and the overview of Vietnamese financial institutions has shown that despite vigorous reforms, the number of people having a bank account is very limited and cash-transactions are dominant in Vietnam. Due to the poor

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<sup>160</sup> Chinh Phu, “Nghị Định Quy Định Chi Tiết Thi Hành Pháp Lệnh Ngoại Hối” [*Government, Decree on Guiding the Implementation of the Ordinance on Foreign Exchange*] No. 160/2006/ND-CP (Vietnam), 28 December 2006, article 48(3)(a).

<sup>161</sup> Decree 116/2013/ND-CP, above n138.

infrastructure of the financial system, most people living in rural areas do not have access to some financial products or services, such as trading securities or insurance products. However, the Vietnamese government and banks recently have taken actions to enhance financial inclusion with the focus on the “underserved” population. Especially, a number of Vietnamese banks and telecommunication companies have been licensed to provide various mobile money services for the “unbanked” and “underbanked”.<sup>162</sup> Those persons without bank accounts can use a mobile phone to pay for a wide range of services and goods or to send and receive money via text-messages and a network of retail agents as cash in/cash out points.<sup>163</sup> Undoubtedly, mobile money is a promising tool for facilitating financial inclusion in Vietnam. However, money laundering risks may stem from the underlying features of mobile money, such as anonymity (unknown or false identity of users), rapidity (quick and virtual transactions) and poor oversight (mobile money providers, e.g., telecommunication companies, may not be subject to certain AML regulations).<sup>164</sup> In Vietnam, mobile money providers are classified as “financial institutions” defined by article 5(3) of the Law on PSML. Therefore, they are obliged to adopt the money laundering preventive measures. Nonetheless, Vietnam thus far has no specific guidance as to how they can adopt those measures appropriately. For example, because most mobile money transactions are domestic and low-value, so according to the FATF Recommendations, those service providers may simplify the CDD procedure or may be even exempt from certain AML obligations.

### **9.9.5      *Comments and Suggestions***

Generally speaking, almost all international AMLs on the preventive measures have been transformed into Vietnamese laws which include the Law on PSML and other relevant legal documents. Nonetheless, the enforcement of these measures has been very limited in Vietnam. This is, as identified above, due to a number of problems including the following: large-scale use of cash for payment; the infancy of financial institutions and DNBPs; the lack of professionalism and regulation of estate agents’ activities; limitations in the national

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<sup>162</sup> Mobile money services have attracted millions of customers in Vietnam. See, e.g., TeleGeography (15 July 2013), “Vinaphone launches mobile money service”, available at: <http://www.telegeography.com/products/commsupdate/articles/2013/07/15/vinaphone-launches-mobile-money-service/> (accessed 23 June 2014).

<sup>163</sup> See more about how mobile money services work in Ignacio Mas and Olga Morawczynski, “Designing Mobile Money Services: Lessons from M-PESA” (2009) 4(2) *Innovations* 77 at 77-88.

<sup>164</sup> See Pierre-Laurent Chatain, et al., “*Integrity in Mobile Phone Financial Services: Measures for Mitigating Risks from Money Laundering and Terrorist Financing*” Working Paper No. 146, World Bank 2008, 10-13.

identification infrastructure; and the inadequate capacity of financial supervisors to supervise and enforce preventive measures, as well as to impose sanctions against violators. In the meantime, the Vietnamese “reporting entities” may have doubts about the aptness of the preventive measures. Can those AML measures be applied effectively to the poor infrastructure of the Vietnamese financial system and the cash-based economy? As pointed out in chapter 3, lack of appropriateness of the norms will hamper the actual implementation of such norms, and that point is sustained here.

Because of limited resources, Vietnam at this stage should utilize the FATF’s rules on simplification and exemption of AML measures as useful tools to alleviate the regulatory burden on financial institutions and DNBP’s, but still can satisfy the FATF’s requirements for adopting the preventive measures. In order to do so, Vietnam should:

i) First undertake its national money laundering risks assessment. The FATF’s guidance on assessing national money laundering risks should be taken into account. The national risk assessment should include the evaluation of threats, vulnerabilities and consequences caused by money laundering.<sup>165</sup> However, the FATF notices that while it is challenging to evaluate the consequences of money laundering,<sup>166</sup> countries may focus primarily on identifying their threats and vulnerabilities.<sup>167</sup> The FATF also has recommended the open-ended lists of money laundering risk factors related to threats and vulnerabilities.<sup>168</sup> Accordingly, an estimation of money laundering threats relies heavily on understanding the nature and extent of predicate offences. The money laundering vulnerabilities are derived mainly from political, economic, social, environmental and legislative factors.<sup>169</sup>

ii) Then provide detailed guidelines on assessing the money laundering risks at a sectoral and institutional level. The sectors subject to a risk assessment can be classified according to the FATF’s guidance.<sup>170</sup> The FATF has already provided general guidelines on money laundering risk assessment in the sectors of new payment products and services, life insurance, money services businesses, legal professionals, casinos, real estate agents, accountants, trust and company service providers, and dealers in precious metals and

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<sup>165</sup> See definitions of these elements in FATF (February 2013), above n97, par. 10.

<sup>166</sup> As also indicated in chapter 2.

<sup>167</sup> FATF (February 2013), above n97, par. 10.

<sup>168</sup> Ibid, Annex I and II.

<sup>169</sup> See these specific examples of these factors in *ibid*, Annex II.

<sup>170</sup> See *ibid*, Annex II, table 1.

stones.<sup>171</sup> Vietnam can depend on these guidelines to design its own risk matrices in identifying risk factors and potential risk levels in different sectors and institutions.

And iii) provide detailed guidelines on applying a RBA to implementing the preventive measures. Vietnam should set out the standards for the exemption from AML measures in compliance with the FATF's exemption rules.<sup>172</sup> While it may be challenging to interpret and apply the "proven low risk" exemption,<sup>173</sup> Vietnam can opt to apply the *deminimis* exemption. Especially, Vietnam should interpret the specific circumstances in which the simplification or exemption of the preventive measures is allowed. Basing on the FATF's general guidance on the RBA<sup>174</sup> and particular guidance on adopting a RBA into different sectors,<sup>175</sup> Vietnam should provide criteria for categorizing which customers, products and transactions can attract a simplified CDD procedure. The FATF has given examples of potentially low risk scenarios.<sup>176</sup>

## 9.10 Conclusion

The money laundering preventive measures imposed on financial institutions and DNBP's have been set out and developed by a number of distinct international institutions. The foremost standard-setting institutions are the FATF Recommendations, the Basel Committee on Banking Supervision and the Wolfsberg AML Principles. Other bodies active in promulgating these preventive measures include the World Bank, the IMF, the Egmont Group, the International Organization of Security Commissioners, and the International Association of Insurance Supervisors. They have adopted the same core standards for the preventive measures and contain cross references to one another. These standards refer to the main measures: CDD, record keeping and reporting of suspicious transactions. The core obligation - CDD - is the requirement of customer identification and verification before financial services are provided for. Record keeping primarily aims to create customer profiles and prevent customers from acting anonymously for the purpose of money laundering. The reporting obligation mainly entails the duty of reporting unusual or suspicious transaction to

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<sup>171</sup> FATF, above n100.

<sup>172</sup> See FATF, above n20, INR 1, par. 6; and FATF (2013), above n97, pars. 55-60.

<sup>173</sup> FATF (2013), above n97, pars. 55-57.

<sup>174</sup> See FATF (2007), above n94.

<sup>175</sup> FATF, above n100.

<sup>176</sup> See FATF, above n20, INR 1, par. 17. See more discussion about low risk products and transactions in Louis de Koker, "Identifying and Managing Low Money Laundering Risk: Perspectives on FATF's Risk-based Guidance" (2009) 16(4) Journal of financial crime 334 at 341-347.

the designated authorities for detecting money laundering. Countries are encouraged to apply the RBA to implementing AML measures, especially the preventive measures. In addition, financial inclusion should be considered as one of the deciding factors in the success of the preventive measures.

In recent years, especially after Vietnam's accession to the WTO in 2007, it has vigorously reformed and developed its financial sector in line with international standards. The banking sector has experienced the proliferation of an ever increasing number of banks and its financial services. There has been a fast growing number of securities and insurance companies. Nevertheless, all these infant sectors are operating in a relatively poor infrastructure and being governing by a lax legal framework.

Following the first AML legal document - the Decree 74/2005/ND-CP, Vietnam has issued and updated a number of other relevant legal instruments to prevent the criminal use of financial institutions and DNFBPs. The crucial provisions stipulate that these entities are subject to the CDD requirement, record keeping and reporting obligation. Under the APG's pressure (through its on-site mutual evaluation) and the FATF's "blacklisting" campaign, Vietnamese laws have been complemented constantly the provisions of the preventive measures in accordance with the FATF Recommendations. As examined above, Vietnam has implemented wholesale the international AMLSs on the preventive measures into its domestic law. As a result, this thesis argues that the new legal framework on the preventive measures of Vietnam has largely complied with the international standards, but just on paper. In fact, the enforcement of these measures is questionable. The actual implementation of preventive measures has been hindered by the lack of necessary resources and preconditions, such as the lack of a national centralized identification system and limited access to and use of the formal financial system. It may take time for Vietnam to fulfil these preconditions.



## **Chapter 10**

### **CONCLUSION**

Within the confine of the aims, scope and methodologies set out in the Introduction, this thesis has critically analysed the key categories of international AML standards (AMLSs), explored the existing inadequacies of and obstacles to the implementation of these standards in Vietnam, and offered recommendations for legal reform and further development of Vietnam's AML legal framework in compliance with the international AMLSs. This chapter will summarize the primary findings of the research and draw some general conclusions.

#### **10.1 The Phenomenon of Money Laundering**

The research reveals that money laundering has evolved over time. It has shifted from a purely intra-national to a transnational dimension and from conventional to more sophisticated and professional typologies. Money laundering has been assisted by economic globalization and the rapid development of technologies. The transitional economies, like Vietnam, are now among the attractive destinations for tainted funds. While some States, such as the US and the UK, are very concerned with money laundering, developing countries, including Vietnam, have paid scant attention to this phenomenon until relatively recently.

This thesis holds that the actual and potential threat of money laundering in Vietnam is significant. However, Vietnam has yet to consider and respond appropriately to the harms and risks of harm caused by money laundering. Although money laundering has been proved to be harmful to both the public and private sectors, it appears to be difficult to specify and evaluate the extent of the harms. This is one of the reasons why money laundering has not been become a serious concern in Vietnam as well as in many other States.

#### **10.2 The Criminalization of Money Laundering**

The criminalization of money laundering is the backbone of the AML legal framework. Thus, the globalization of criminalization of money laundering is the foremost target of the international AL regime. This target, in fact, has been almost met. Most States have criminalized money laundering as a separate criminal offence in a quite similar way. Although States inevitably still vary in their criminalization of money laundering, for example in the categorization of the predicate offences or in *mens rea* elements, the

harmonization of national criminalization of money laundering is evident. Over time, this will reduce friction in international cooperation in investigation, prosecution and punishment for money laundering offences. Nevertheless, the globalization of criminalization of money laundering is challenging to some national criminal law systems which have their own unique concepts and procedures. Vietnam's criminal law is one such case.

Vietnam's history of borrowing different foreign laws has resulted in a number of peculiarities in Vietnamese criminal law. It appears that Vietnam's lawmakers have transformed wholesale the international provisions of the *actus reus* of money laundering offences into the model applied in Vietnam, without careful consideration of whether it is practical (e.g., the broad scope of predicate crimes) and whether it is consistent with the core principles of criminal law of Vietnam (e.g., the principle of "social danger"). This leads to the fact that while in the statute books, Vietnam's criminalization of money laundering complies with the international standards, the application in practice may cause some problems. One such problem, for example, is the lack of willingness of Vietnamese law enforcement agencies to investigate and prosecute money laundering. The law enforcement agencies may ask themselves whether some concepts embodied in the international legal instruments are compatible with the existing relevant Vietnamese provisions (e.g., the concept of the proceeds of crime) or whether the implementation is compatible with domestic principles of criminal law. Therefore, along with law reform, Vietnam needs to have a high degree of consensus - at the very least among its lawmakers and law enforcement agencies - about the harms/"social danger" of money laundering, and it must decide to provide sufficient resources to investigate and prosecute money laundering offenders.

### **10.3 Jurisdiction over Money Laundering Offences**

This thesis has pointed out that international law has settled on a number of standards for exercising criminal jurisdiction over transnational money laundering. There are certain internationally agreed grounds on which States will claim jurisdiction and deal with the situation of jurisdictional concurrence. As usual, States prioritize the principle of subjective territoriality in the consideration of establishing extraterritorial jurisdiction over money laundering. In practice, many States are cautious about claiming extraterritorial jurisdiction in general and over money laundering in particular. This is because exercising extraterritorial jurisdiction usually requires significant resources and may involve competing jurisdiction with other States, which is a burdensome process. There is no fixed formula for resolving

jurisdictional concurrence. However, it is normally based on negotiation, and the State which has a creditable legal basis and adequate resources often has an advantage. Some States, such as the US, are enthusiastic about imposing extraterritorial extradition over cross-border money laundering. Others, for example Vietnam, are reluctant to claim this jurisdiction, because they often lack adequate legal bases and resources.

Competing or concurrent jurisdiction over transnational money laundering will occur more frequently in the future. Thus, given the limited resources of Vietnamese legal enforcement authorities which put it at a significant disadvantage in asserting its jurisdiction against that of other competitor States, Vietnam needs to, at least, provide a comprehensive legal framework for asserting extraterritorial jurisdiction. Otherwise, Vietnam will fail in claiming extraterritorial jurisdiction over cases in which it may have a strong interest.

#### **10.4 Provisional Measures and Confiscation of Criminal Assets**

Strengthening the measures of identifying, tracing, freezing or seizure and eventual confiscation of criminal assets contributes to the AML regime in many ways. For example, these measures not only aim to locate the proceeds of crime, alleged property laundered, its roots and predicate offences but also to prevent the transaction and other manipulation of funds. Therefore, the money laundering process may be prevented.

The thesis has found that national legislation on confiscation still differs significantly, especially between common law States and civil law States. The substantial differences lie in the type of assets subject to confiscation and the procedures for confiscation. While several common law States apply both conviction-based and non-conviction based confiscation and some even accept reversal of the burden of proof in the confiscation process (requiring an offender to demonstrate the lawful origin of the property alleged to be subject to confiscation), most civil law States only adopt conviction-based confiscation and do not allow reversal of the burden of proof. These differences are among various insurmountable barriers to international cooperation in confiscation of criminal assets.

The thesis has revealed that in current Vietnamese laws, there is no separate legal provision of interim measures for the purposes of confiscation of criminal proceeds. Some concepts and procedures are new to Vietnamese law enforcement agencies (e.g., the concept of “property” and the procedure of non-conviction based confiscation). The thesis has made suggestions for reforming the relevant legal provisions of Vietnam. It may be not difficult for Vietnam to revise the laws on paper, but it will be very challenging to implement the legal

changes in fact, as those concepts and procedures are absolutely unfamiliar to Vietnamese law enforcement agencies.

### **10.5 Mutual Legal Assistance in Anti-Money Laundering**

Beyond the traditional scope of mutual legal assistance (MLA) in criminal matters, MLA in combating money laundering covers some nascent aspects, such as the international exchange of information related to money laundering (e.g., about suspicious transactions) through the Financial Intelligence Unit (FIU) network, the assistance in executing provisional measures and confiscation of criminal assets, and in sharing or returning the confiscated assets.

Treaty-based MLA is the most formal mechanism of legal assistance in AML, which is usually subject to certain conditions/principles, such as double criminality and *non bis in idem*. In practice, some troublesome problems may arise from the interaction between the execution of MLA and professional regulations, for instance, in respect to banking secrecy and professional privilege. However, for the sake of combating money laundering, these regulations should give way to the execution of legal assistance requests for AML in reasonable circumstances.

Although the emerging aspects of legal assistance in AML have not been provided for in national law, they have been updated in the recent bilateral treaties on MLA of Vietnam. Nevertheless, their implementation in fact is very challenging to Vietnam's law enforcement agencies, because of the novelty of the practice and the legal inappropriateness (e.g., regarding legal assistance in confiscation of criminal assets).

### **10.6 Extradition for Money Laundering Offences**

Responding to the international AML regime, most States have made money laundering offences extraditable offences. The suppression conventions and the FATF call for their State Parties and member countries to harmonize their national laws on extradition for money laundering offences. In fact, it is evident that the application of the double criminality condition, the specialty rule and the evidence standard to extradition for transnational money laundering offences has become more flexible in some countries. Nevertheless, extradition for money laundering offences still faces several obstacles. Some of them relate to the requirement of double criminality and the specialty rule with regard to predicate offences

(e.g., difference in the categories of predicate offences between States), especially when predicate offences occurred abroad.

In the context of Vietnam, given the shortcomings of national laws on extradition and the shortage of bilateral extradition treaties, Vietnam should, at least, show its commitment to the international AMLSs by abolishing the reservations to article 6 of the Vienna Convention. Vietnam can make further legal changes to obtain a “paper” compliant implementation of the relevant international standards. However, extradition in general and especially for money laundering offences in particular is dependent very much on political factors, thus an actual implementation would be still weak.

### **10.7 Imposing AML Preventive Measures on Financial Institutions, Designated Non-Financial Businesses (DNFBPs) and Professions**

The money laundering preventive measures, viz. customer due diligence, record keeping and reporting obligations are designed to uncover the opportunities that facilitate the operation of money laundering. They are very important to a national AML strategy. However, these measures cannot be implemented effectively in a particular country unless they fit the facilities and capacity of the financial institutions and DNFBPs of that country. Fortunately, the FATF has foreseen this interaction. The FATF allows States, upon the risk-based approach (RBA), to adjust the preventive measures to certain specific circumstances. Another factor, that influences whether the preventive measures really benefit a national AML strategy, is the issue of financial inclusion. The implementation of the preventive measures may be not effective and even have a reverse effect in a country whereby the majority of population do not have access to formal financial institutions.<sup>177</sup>

Vietnamese laws generally have provided for preventive measures in compliance with the international standards. Nonetheless, because of numerous factors, especially the issue of

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<sup>177</sup> One example is when the Barclays bank (in the UK) closed the accounts of some of its money service businesses to minimise the risk of breaching money laundering regulations. The closure of the UK bank accounts belonging to cash-transfer firms, through which the UK's Somali diaspora sent money to their home country, would force many Somalis to choose illegal ways to send money home, such as through unlicensed remittance agents, because Somalia lacks a banking system. This may even result in more money laundering. See Mark Tran (9 August 2013), “Somalia's Remittances Quandary: What Are the Options Post-Barclays?”, available at: <http://www.theguardian.com/global-development/2013/aug/09/somalia-remittances-options-barclays> (accessed 20 August 2013).

financial exclusion and insufficient resources, the implementation of those measures has been limited in practice.

## **10.8 Final Remarks**

To sum up, the international AMLSs have been formulated and diffused in response to transnational money laundering. Similarly to other international standards and regimes against transnational crimes, the AMLSs tend to serve the interests of the dominant States. Moreover, and this is significant, many of these standards have been drawn from Western legal models and have been tailored to suit their legal systems.

A vast array of AML standards, which originally only had a domestic effect, has been globalized and developed through both “hard law” (e.g., the suppression conventions) and “soft law” (e.g., the FATF Recommendations and codes of conducts of other intergovernmental organizations). The “soft law” normally reflects and consolidates the provisions of the “hard law”. Interestingly, in the diffusion of AMLSs, soft-law initiatives with non-binding rules seem to have more influence than hard-law obligations. The FATF has been successful in inducing both member and non-member countries to implement and comply with its Recommendations. The FATF, FATF-style regional bodies and some other international organizations (e.g., the IMF and WB) have collaborated to set up the mechanisms for diffusing international AMLSs. Coercion by “blacklisting” and State socialization are employed as the appropriate mechanisms. Indeed, they are being applied effectively in the context of Vietnam. As pointed out, despite the fact that several international AMLSs are not compatible with the background of Vietnam (e.g., the principles of criminal law and the infrastructure of the financial system), Vietnam has no choice but to implement and comply with the AMLSs.

In recent years, Vietnam has shown the political commitment and taken several actions to implement the international AMLSs. Vietnam has achieved significant progress in developing its AML legislation, though certain deficiencies remain. Given the existing deficiencies as identified, Vietnam can undertake necessary law reforms and set up a comprehensive AML legal framework. Nevertheless, the successful AML system of a country requires more than adequate AML laws. Importantly, these laws should be enforced effectively in practice. Through the examination in the previous chapters, the thesis concludes with an argument that Vietnam could obtain a high degree of “paper” compliance with international AMLSs in the near future, but it has still a long way to go before reaching that

degree of actual compliance required by the international community. That is primarily because of inauthentic political will, legal inappropriateness and inadequate resources in AML.

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